Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 87-90)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: July 1, 1987 through September 30, 1987.

Country	Name of currency	U.S. dollars
Australia	Dollar	0.720900
Austria	Schilling	0.077806
Belgium	Franc	0.026337
Brazil	Cruzado	0.000000
Canada	Dollar	0.751597
China, P.R.	Renimbi yuan	0.267996
Denmark	Krone	0.144279
Finland	Markka	0.224341
France	Franc	0.163934
Germany	Deutsche mark	0.546777
Hong Kong	Dollar	0.128041
India	Rupee	0.077700
Iran	Rial	N/A
Ireland	Pound	1.464000
Italy	Lira	0.000755
Japan	Yen	0.006810
Malaysia	Dollar	0.395804
Mexico	Peso	N/A
Netherlands	Guilder	0.485437
New Zealand	Dollar	0.593000
Norway	Krone	0.149098
Philippines	Peso	N/A
Portugal	Escudo	0.006991
Republic of South Africa	Rand	0.489500
Singapore	Dollar	0.472032
Spain	Peseta	0.007891

Country	Name of currency	U.S. dollars
Sri Lanka	Rupee	0.034159
Sweden	Krona	0.156446
Switzerland	Franc	0.658111
Thailand	Baht (tical)	0.038730
United Kingdom	Pound	1.615500
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-91)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 1, 1987	$0.007313
June 2, 1987	.007427
June 3, 1987	.007413
June 4, 1987	.007366
June 5, 1987	.007377
South Korea won:	
June 1, 1987	.001210
June 2, 1987	.001210
June 3, 1987	.001213
June 4, 1987	.001212
June 5, 1987	.001212
Taiwan N.T. dollar:	
June 1, 1987	.031706
June 2, 1987	.031756
June 3, 1987	.031807
June 4, 1987	.031857
June 5, 1987	.031898

(LIQ-03-01 S:COM CIE)

Dated: July 1, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-92)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 8, 1987	$0.007402
June 9, 1987	.007435
June 10, 1987	.007457
June 11, 1987	.007440
June 12, 1987	.007429
South Korea won:	
June 8, 1987	.001216
June 9, 1987	.001219
June 10, 1987	.001222
June 11, 1987	.001224
June 12, 1987	.001224
Taiwan N.T. dollar:	
June 8, 1987	.031959
June 9, 1987	.031990
June 10, 1987	.031990
June 11, 1987	.032051
June 12, 1987	.032072

(LIQ-03-01 S:COM CIE)

Dated: July 1, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-93)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 15, 1987	$0.007326
June 16, 1987	.007326
June 17, 1987	.007315
June 18, 1987	.007329
June 19, 1987	.007307
South Korea won:	
June 15, 1987	.001224
June 16, 1987	.001223
June 17, 1987	.001225
June 18, 1987	.001225
June 19, 1987	.001227
Taiwan N.T. dollar:	
June 15, 1987	.032113
June 16, 1987	.032113
June 17, 1987	.032123
June 18, 1987	.032113
June 19, 1987	.032113

(LIQ-03-01 S:COM CIE)

Dated: July 1, 1987.

Angela DeGaetano,
Chief,
Customs Information Exchange.

(T.D. 87-94)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 22, 1987	$0.007267
June 23, 1987	.007283
June 24, 1987	.007315
June 25, 1987	.007289
June 26, 1987	.007305
South Korea won:	
June 22, 1987	.001227
June 23, 1987	.001227
June 24, 1987	.001226
June 25, 1987	.001229
June 26, 1987	.001229
Taiwan N.T. dollar:	
June 22, 1987	.032123
June 23, 1987	.032123
June 24, 1987	.032134
June 25, 1987	.032123
June 26, 1987	.032123

(LIQ-03-01 S:COM CIE)

Dated: July 1, 1987.

Angela DeGaetano,
Chief,
Customs Information Exchange.

(T.D. 87-95)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies

shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 29, 1987	$0.007289
June 30, 1987	.007289
South Korea won:	
June 29, 1987	.001231
June 30, 1987	.001123
Taiwan N.T. dollar:	
June 29, 1987	.032134
June 30, 1987	.032123

(LIQ-03-01 S:COM CIE)

Dated: July 1, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 87–72)

PROCTOR & GAMBLE DISTRIBUTING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–04–00618

[Judgment for defendant.]

(Decided June 24, 1987)

Sandler & Travis (Gilbert Lee Sandler) and *Proctor & Gamble Company (Madeline L. Shay),* for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court for decision following post-trial briefing. The imported article at issue is Luvs Disposable Diapers. The Customs Service has determined that all components of the diapers, but one, are entitled to duty-free treatment as articles of the United States, assembled abroad and returned, under item 807, Tariff Schedules of the United States (TSUS) (1981). The issue before the court is whether the remaining component, the inner absorbent core of the diaper, is entitled to duty-free treatment, as well.[1]

Item 807 is the only tariff provision relevant to this dispute. It reads as follows:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting * * *. A duty upon the full value of the imported article, less

[1] There is no dispute that but for item 807 the diapers would be dutiable under item 256.70, as articles of pulp at 3.8% ad valorem.

the cost or value of such products of the United States (see headnote 3 of this subpart)

FACTS

The record reveals the following. The absorbent core material is exported in a form called "dry lap." Dry lap is transported in large compact rolls suitable for shipping and for the "assembly" process at issue. Dry lap is itself a fabricated component, consisting of a chemically prepared, clean, dry form of wood pulp. The process of producing dry lap from trees is a long and complicated one, which need not be explained here.

The dry lap becomes part of the diaper through a multi-step process which separates the dry lap fibers creating air spaces between the fibers, giving the material its high absorbency characteristic. The absorbent core material is then formed into the appropriate diaper shape and joined with the other diaper components.[2]

DISCUSSION

Item 807 contains three parts, each of which must be satisfied before a component qualifies for duty-free treatment.

The first part requires that a fabricated component be exported in condition ready for assembly without further fabrication. The dry lap was clearly fabricated. The issue is whether it was "further fabricated" before it was assembled with the other diaper components. The meaning of the words "further fabricated" has been explained in several cases, notably *E. Dillingham, Inc.* v. *United States,* 60 CCPA 39, 470 F.2d 629 (1972); three cases entitled *General Instrument Corp.* v. *United States,* 59 CCPA 171, 462 F.2d 1156 (1972); 60 CCPA 178, 480 F.2d 1402 (1973); and 61 CCPA 86, 499 F.2d 1318 (1974); *United States* v. *Texas Instruments, Inc.,* 64 CCPA 24, 545 F.2d 739 (1976); *Rudolf Miles* v. *United States,* 65 CCPA 32 (1978); *Zwicker Knitting Mills* v. *United States,* 67 CCPA 37, 613 F.2d 295 (1980) and *United States* v. *Mast Indus., Inc.,* 69 CCPA 47, 668 F.2d 501 (1981).

Summarizing, the court notes that the opening, oiling and carding of fibers is "further fabrication" (*Dillingham,* 60 CCPA at 40, 470 F.2d at 633); stitching to close glove fingers is "further fabrication" (*Zwicker,* 67 CCPA at 41, 613 F.2d at 297); cutting to length, despooling, winding, taping and cementing wire is *not* "further fabrication"; cutting to length and trimming foil and tape is *not* "further fabrication" (*General Instrument,* 59 CCPA at 177, 462 F.2d at 1160; 60 CCPA at 183–84, 480 F.2d at 1406; 61 CCPA at 89, 499 F.2d at 1320–21); cutting silicon chips along premarked "streets" is *not* "further fabrication" (*Texas Instruments,* 64 CCPA at 30, 545 F.2d at 744); burning slots and holes in Z-beams is not "further fabrication" (*Rudolph Miles,* 65 CCPA at 37), buttonholing

[2] Description of the details of the process would reveal confidential information. The transcript of the trial and video tape evidence amply depict the process.

and slitting pants pockets is *not* "further fabrication" (*Mast Indus.*, 69 CCPA at 52, 668 F.2d at 505). In addition, the *Dillingham* court found that needling of felt base for the insertion of fibers was an assembly process, which would seem to preclude its being "further fabrication."

Although the courts hesitate to generalize across products, it appears likely that hole punching necessary to joining, as with Z-beams and felt base, is not further fabrication, nor is pre-patterned cutting or trimming. The sewing and knitting cases seem to indicate that such operations are fabrication only if they create the basic article. (No sewing or knitting was involved here.) It appears to the court that the process of creating the diaper core from the dry lap is more than just hole punching or needling for joining. First, it is the creating of air spaces, which are analogous to holes, that gives the material its most important characteristic—high absorbency. Next, the process also creates the basic diaper shape from a roll of dry lap. This is not equivalent to despooling wire and cutting it to length. It is rather like the process of creating the wire from other forms of metal. It appears, based on these cases, that the dry lap was "further fabricated" prior to assembly.

As the foregoing issue is not entirely clear-cut it seems prudent to examine the second requirement of item 807. The *Dillingham* case, in its discussion of felt base, states that form changes only affect duty status under item 807 if they cause the article to lose its physical identity. 60 CCPA at 46; 470 F.2d at 635. Certainly it is possible to tell that the diaper core is made from the dry lap—that fact is never obscured—but the compact dry lap in roll form in no way resembles the fluffed, fully formed diaper core. This is not simply cutting lengths from the dry lap, it is the making of a new article. Thus, the second criterion for duty-free treatment under item 807 is not met.

The final criterion appears irrelevant. The dry lap is not so much advanced in value or improved in condition as it is advanced in the manufacturing process toward a completed diaper. The process described in no way resembles incidental cleaning or lubricating.

Looking at item 807 as a whole, and at the process as a whole, it appears to the court that the creation of the diaper core is not merely an assembly process, a process incidental to assembly or some other minor activity; rather, it involves substantial fabrication and changes in physical characteristics which give the finished product its essential feature.

The court's analysis necessarily rejects plaintiff's main argument, that is, that the individual fibers are the components, not the dry lap. The court rejects this concept based on the *Dillingham* decision's discussion of fiber. The court there stated, in response to the essentially identical argument, "We believe that the fiber must be considered to be a component in the bulk, baled form, *en masse,* in which it left the United States." 60 CCPA at 43; 470 F.2d at 633. In this case the testimony indicated that the fibers are always handled

in the aggregate and never individually. The dry lap rolls, not the individual fibers, are the exported product. The diaper core with its fiber matrix and air spaces is the component to be assembled, not the individual fibers.

Plaintiff has failed to establish that the diaper core is entitled to duty-free treatment under item 807 and defendant has demonstrated that its classification decision was correct. Judgment is to be entered for defendant.

(Slip Op. 87-73)

CHRYSLER CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-10-01538

Before CARMAN, *Judge.*

[Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for dismissal and for summary judgment is granted.]

(Decided June 26, 1987)

Ross & Hardies (Joseph S. Kaplan on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Nancy E. Reich* on the motion) for defendant, United States.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* Plaintiff Chrysler Corporation (plaintiff) moves for an order granting summary judgment pursuant to Rule 56 of the rules of this Court. Plaintiff's motion alleges the defendant United States (defendant), through its Customs Service (Customs), erred in failing to approve plaintiff's protests against Customs' failure to reliquidate certain entries under the authority of section 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1) (§ 520(c)). Defendant cross moves for an order: (a) severing and dismissing the first cause of action alleged in the complaint as to an unnumbered protest; and (b) dismissing all of plaintiff's claims with respect to Protest Nos. 3801-2-001477 and 3801-2-001735 for lack of jurisdiction and/or for failure to state a claim upon which relief can be granted. Plaintiff's motion for summary judgment is denied. Defendant's cross-motion to sever and dismiss and to dismiss for lack of jurisdiction and for failure to state a claim is granted. This action is dismissed.

BACKGROUND

Plaintiff commenced this action claiming Customs erred in its decision to deny plaintiff's protest of Customs' appraisal and liquidation of three entries of imported merchandise consisting of used cut-

ting tools, metal forming tools, and tool holders utilized in the manufacture of automobile parts. Plaintiff also claims Customs erred in denying plaintiff's request for reliquidation of the three consumption entries pursuant to § 520(c) and in denying plaintiff's subsequent protests of Customs' denials.

Both parties now move for dismissal and/or summary judgment pursuant to Rule 56 of the rules of this Court and have submitted their "Statement of Material Facts". Based upon the pleadings and papers contained in the Court file, the following material facts are not in dispute:

Plaintiff, a manufacturer of automobiles, imported certain used metal cutting and forming tools and tool holders under cover of three consumption entries at Detroit, Michigan: No. 81–579575, dated October 27, 1980; No. 81–579576, dated October 28, 1980; and No. 81–580373, dated December 12, 1980. For purposes of classification, the Tariff Schedules of the United States (TSUS) provide for separate classifications covering cutting tools, shaping tools, and tool holders. Plaintiff identified the composition of each machine entered and allocated these separate classifications among the applicable tariff provisions. These allocations were included in depreciation schedules attached to the entry papers plaintiff submitted upon importation of the used merchandise.

The entry papers included invoices prepared by Houdaille Industries of Canada Limited, the foreign shipper, which listed the original purchase price values for the imported merchandise. The invoices indicated the machines were used. The entry papers also included detailed depreciation tables showing the remaining lives and values of the imported used merchandise in accordance with plaintiff's standard depreciation practice. This depreciation information resulted in lower values attributable to the used merchandise than those values determined by Customs' depreciation formula. Customs rejected plaintiff's method of depreciation and applied a 10 percent per year depreciation to the value set forth on the Houdaille invoices, resulting in a depreciation value greater than that of plaintiff's. All three entries of used merchandise were liquidated on October 2, 1981. Plaintiff did not file a proper protest objecting to the liquidation within 90 days in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (§ 514).

On May 28, 1982, plaintiff petitioned the District Director of Customs at Detroit, Michigan, by letter, requesting reliquidation of the entries pursuant to § 520(c). Plaintiff contended a mistake of fact or other inadvertence occurred in the liquidation of the entries. Customs denied plaintiff's reliquidation request only as to entry No. 81–579576 on June 23, 1982.

On September 20, 1982, plaintiff filed Protest No. 3801–2–001477, objecting to the denial of its petition to reliquidate entry No. 81–579576. Customs denied this protest, on October 14, 1982, as untimely, but this denial was later rescinded. The protest was ap-

proved for further review and ultimately denied on June 7, 1983. Customs took no action on the requests for reliquidation under § 520(c) with respect to entries Nos. 81–579575 and 81–580373.

On August 23, 1983, plaintiff filed its Protest No. 3801–3–001735 objecting to Customs' failure to act upon the request for reliquidation of entries Nos. 81–579575 and 81–580373. This protest was subsequently denied as premature by Customs on September 9, 1983.

Plaintiff filed this present action challenging Customs' denial of both protests, on October 25, 1983. In its complaint, plaintiff raised two causes of action. The first involved plaintiff's purported protest, filed pursuant to § 514, contesting the liquidation of all three entries of merchandise in question. The second concerned the requests for reliquidation filed by plaintiff pursuant to § 520(c).

Plaintiff's present motion for summary judgment rests only on the challenge to Customs' appraisal and liquidation of the entered used merchandise. Plaintiff contends Customs made a mistake, or an inadvertence occurred, as addressed in § 520(c) which states:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> > (1) a clerical error, mistake or fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction * * *

19 U.S.C.A. 1520(c)(1) (1980).

Plaintiff contends Customs failed to use the plaintiff's depreciation information, supplied with all the documents and invoices, to appraise the imported merchandise. Plaintiff argues this failure was due to Customs' disregard for or oversight of the submitted papers and amounted to a mistake or inadvertence as set forth in § 520(c). Therefore, argues plaintiff, Customs should have remedied those mistakes or inadvertences by reliquidation as requested.

Defendant, on the other hand, avers plaintiff's depreciation schedules were known and considered by Customs Service employees, but were ultimately rejected for Customs' depreciation rate, which was used to value the used merchandise. Defendant also moves for dismissal and/or summary judgment.

Defendant first asserts plaintiff's first cause of action, concerning the alleged § 514 challenge of the liquidation, was never filed; has not been substantiated by any proof as to having been filed; and has been abandoned subsequently by plaintiff, as evidenced by documents in defendant's interrogatories submitted to the Court. Therefore, defendant claims, this first cause of action should be severed and dismissed.

Defendant's second argument addresses plaintiff's second claim, Customs failed to adhere to the statutory mandate of § 520(c). Specifically, defendant alleges this Court has no jurisdiction to consider plaintiff's claims because Customs had no authority to rescind its denial of plaintiff's protests of October 14, 1982.

Defendant also claims this Court lacks jurisdiction as to Chrysler's claims surrounding Protest No. 3801–3–001735 because plaintiff is objecting to Customs' denial of the remaining two protest petitions, denials which have not yet occurred.

Defendant further argues plaintiff has not stated a claim upon which relief can be granted because plaintiff has not satisfied the requirements of § 520(c) in order to succeed on its claim.

Discussion

This Court will decide motions for summary judgment within the following guidelines:

> [S]ummary judgment * * * is entirely appropriate * * * where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law * * *. The movant bears the burden of demonstrating absence of all genuine issues of material fact, * * * the * * * court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in its favor, * * * and must resolve all doubt over factual issues in favor of the party opposing summary judgment * * *.

SRI International v. *Matsushita Electric Corporation of America,* 775 F.2d 1107, 1116 (Fed. Cir. 1985) (citations and footnotes omitted).

Defendant's first assertion, in its cross-motion, seeks to sever and dismiss plaintiff's first cause of action which alleges plaintiff filed a proper protest against the liquidation of all three entries pursuant to § 514(a). Defendant provides documentation of plaintiff's response to defendant's interrogatories in which plaintiff affirmatively "abandons the claim that it filed a protest on December 29, 1981." Plaintiff's Answers to Defendant's First Set of Interrogatories, #5(a)–(c), *Chrysler Corp.* v. *United States,* Court No. 83–10–01538, Defendant's Exhibit E. Plaintiff does not deny nor address this matter in its response to defendant's motion for dismissal. This Court holds plaintiff has abandoned this cause of action and severs and dismisses this portion of the complaint.

Under defendant's lack of jurisdiction argument, defendant claims plaintiff's Protest No. 3801–3–001735, which protests the District Director of Customs' failure to rule upon the plaintiff's May 28, 1982 reliquidation request petition, is untimely. Defendant maintains plaintiff protests conduct which never occurred, since its § 520(c) petitions for the 81–579575 and 81–580373 entries are still pending.

Plaintiff's Protest No. 3801-3-001735 was filed pursuant to 19 U.S.C. §§ 1514 and 1515(a). Section 1514 provides for a party to protest the following decisions of the District Director:

> (a) The appraised value of merchandise;
> (b) The classification and rate and amount of duties chargeable;
> (c) All charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (d) The exclusion of merchandise from entry or delivery under any provision of the Customs laws;
> (e) The liquidation or reliquidation of an entry, or any modification thereof;
> (f) The refusal to pay a claim for drawback; and
> (g) The refusal to reliquidate an entry under section 520(c), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)).

19 C.F.R. § 174.11 (1983). *Accord* 19 U.S.C. § 1514(a).

Under the present circumstances, plaintiff has protested a decision of the District Director not provided for in § 1514. Although plaintiff has not addressed this issue in its response memorandum, it could be argued plaintiff is protesting an alleged decision of the District Director to refuse to reliquidate by failing to act. Notwithstanding this argument, § 1515(a) provides the appropriate customs officer has until two years, from the filing of the protest, to make a decision on the protest. Defendant has correctly indicated that plaintiff has filed its No. 3801-2-001477 protest prematurely. This Court, therefore, lacks jurisdiction to consider this matter.

Defendant's other argument under its lack of jurisdiction contention states plaintiff's cause of action against the denial of a protest was also untimely filed. Plaintiff's original petition for reliquidation under § 520(c) was denied by Customs on June 23, 1982. On September 20, 1982, plaintiff filed Protest No. 3801-2-001477, objecting to the denial of its petition for reliquidation. Customs denied this protest as untimely on October 14, 1982, was convinced by plaintiff to rescind this denial, rescinded the denial, reviewed the protest, and ultimately denied the protest on June 7, 1983. Plaintiff then filed this action on October 25, 1983.

Defendant now argues Customs had no authority to rescind its denial of October 14, 1982 and reconsider the protest. The provisions of 28 U.S.C. § 2636(a)(1), defendant asserts, specifically requires a civil action, contesting the denial of a protest under § 515, be commenced within 180 days after the mailing of the denial notice. Defendant states the 180 day limitation ran from October 14, 1982, the first denial date, and not from June 7, 1983, the second denial date.

As support for the proposition Customs was without authority to revoke or rescind the denial, defendant refers to the case of *San Francisco Newspaper Printing Co.* v. *United States,* 9 CIT ——, 620 F. Supp. 738 (1985). In *San Francisco,* the defendant moved to sever and dismiss part of the plaintiff's action because it was commenced

beyond the 180 day limitation. The plaintiff, in that case, argued Customs had rescinded the denial of the protest and therefore was estopped from asserting a timeliness defense. The Court identified the question of that case as whether or not "Customs may rescind the denial of a protest after it has been mailed." *Id.* CIT at ——, 620 F. Supp. at 740.

The *San Francisco* court and this Court are presented with different circumstances surrounding a similar, but not identical, issue and thus the two cases are distinguishable. In *San Francisco*, Customs did not not notify the plaintiff of a second denial of the protest. Plaintiff's attorney produced his affidavit averring he discussed the petition with a Customs official who said the protest *could be* rescinded. It was further averred the denial was rescinded on or before October 6, 1980, and no action was commenced due to the reliance on the rescission.

The instant case, on the other hand, involves an error by Customs in computing the 90 days limitation plaintiff had in filing its protest after the liquidation. Customs originally communicated a denial of plaintiff's Protest No. 83–2–001477 on October 14, 1982, as untimely. Upon closer scrutiny, Customs realized it had incorrectly calculated the 90 days and therefore communicated a denial of a timely filed protest as untimely. Customs conveyed to plaintiff the rescission of the denial, reviewed the protest, denied the protest, and subsequently notified plaintiff of its second notice of denial on June 7, 1983. The issue before this Court expands the *San Francisco* issue to include the question of which protest denial communication should start the running of the 180 day limitation within which to commence this action. In the instant action, it was the June 7, 1983 protest denial.

Of paramount importance in distinguishing the two cases is recognizing the *San Francisco* fact pattern contained the mailing of a first denial notice to the plaintiffs; whereas the instant circumstances do not. Neither defendant nor plaintiff submit to this Court any proof showing a *written* notice, of the October 14, 1982 decision to deny the protest, was mailed. Also important to note is the *San Francisco* fact pattern did not contain Customs' notification to the plaintiff of a second protest denial; the instant circumstances do. Customs transmitted a denial of Protest No. 3801–2–001477 as untimely on October 14, 1982. Having recognized the untimeliness error, Customs rescinded the denial, notified plaintiff of this decision, and finally denied the protest on June 7, 1983.

Section 2636(a)(1) firmly establishes "[a] civil action contesting the denial * * * of a protest under section 515 * * * is barred unless commenced * * * within one hundred and eighty days after *the date of mailing* of notice of denial of a protest * * *." 28 U.S.C. (a)(1) (1982) (emphasis added). The statute requires the *mailing* of the notice in order to begin the counting of the one hundred and eighty day limitation.

This Court, having determined Customs, in this case, did not mail out a written notice of a protest denial on October 14, 1982; and having further determined the defendant's answer to the complaint clearly admits June 7, 1983 is the date the District Director of Customs denied the plaintiff's Protest No. 3801-2-001477 pertaining to entry 81-579576, holds plaintiff filed its action within the statutory framework. This Court does have jurisdiction to hear those matters still surviving in the action concerning entry 81-579576.

The final issue before this Court is whether or not a valid claim exists under § 520(c). Plaintiff, in its motion for summary judgment, contends its depreciation information submitted to Customs, with the invoices, explaining plaintiff's valuation of the merchandise was overlooked by Customs, was not taken into consideration in Customs' valuation of the merchandise, and therefore constituted a mistake or error provided for in § 520(c).

Defendant denies Customs overlooked this information and maintains Customs was aware of and considered plaintiff's information, but ultimately rejected plaintiff's information in favor of its own valuation procedure.

Defendant counters plaintiff's summary judgment argument with its own summary judgment motion arguing plaintiff has failed to satisfy the requirements of § 520(c) and thus has not established a claim upon which relief can be granted.

A valid claim under § 520(c) must establish the following: (1) the existence of a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law; (2) an adverse effect to the importer due to the error; (3) a manifestation of the error in the record; and (4) a showing that the error was brought to the attention of the appropriate Customs officer within one year after the date of the liquidation. 19 U.S.C. § 1520(c).

Plaintiff's first contention is Customs overlooked and, therefore, was unaware of the depreciation schedules submitted. This argument is without merit as evidenced by plaintiff's memorandum in support of the protests, which was submitted to Customs. The following is a passage from the memorandum:

> The staff of Chrysler's Customs Department immediately researched the supplier records for the tool purchase orders and amendments and for part production records. From these records a schedule was developed that itemized all the purchase order amendments and production information in order to properly document depreciation of the tooling. This method of depreciation has been agreed to by Customs for Chrysler Corporation's annual foreign tooling report and is in accordance with generally accepted accounting procedures. A copy of the schedule is included in this protest and has been labeled Exhibit B.
>
> On October 24 the broker made a phone call to the Import Specialist to apprise him of the facts; namely, that the values shown on Houdaille's customs documents were erroneous, that the tooling was used, and to confer about making entry based

on the depreciated values. The Import Specialist verbally indicated that he would not accept an entry if Chrysler's schedule was used. A phone call was then made to the Supervisory Import Specialist, who agreed that entry could be made using the values developed by Chrysler. The entry summary was submitted with a copy of the valuation and depreciation schedule and a copy of the original tool purchase order and all subsequent amendments to the purchase order.

Defendant's Memorandum in Support of Defendant's Motion For Dismissal and/or For Summary Judgment, *Chrysler Corp.* v. *United States,* Court No. 83–10–01538, Defendant's Exhibit L, p. 1. It is clear from plaintiff's own admission plaintiff's method of depreciation was agreed to by Customs for acceptance but the Import Specialist would not accept plaintiff's values if the depreciation schedule was used. This portion of the record also establishes Customs, via its Import Specialist, affirmatively decided not to accept the values submitted using the plaintiff's depreciation schedule. Further, the Import Specialist's deposition establishes the method chosen by Customs to depreciate the used merchandise has been the standard operating procedure utilized in valuation of similar merchandise imported by other major domestic car manufacturing companies. *Id.* at Defendant's Exhibit O, pp. 14–15. The record does not support plaintiff's contention an error, mistake, or inadvertence occurred because Customs overlooked or did not take into account plaintiff's submitted depreciation information. Plaintiff's motion for summary judgment is denied.

Defendant's cross-motion for dismissal and/or summary judgment, stating plaintiff has not set forth a valid claim under § 520(c), contains the argument no clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law exists. This is the gravamen of a claim under § 520(c). Customs' decision, defendant continues, to disregard plaintiff's depreciation information, if found to be an error, was not an error of fact but of law and therefore does not fall within the purview of § 520(c).

Plaintiff opposes defendant's conclusion and states "the determination of the appraised value in question is *normally* factual." Plaintiff's Response in Opposition to Defendant's Motion for Dismissal and/or Summary Judgment, *Chrysler Corp.* v. *United States,* Court No. 83–10–01538, p. 4 (emphasis added). Plaintiff bolsters this conclusion with reference to *Lester Engineering Company* v. *United States,* 3 CIT 236 (1980).

In *Lester,* the Court held "[a]ppraisement on the basis of constructed value involves a complex compilation and analysis of many facts covering various costs, expenses and profits, and such factual determinations certainly are susceptible to clerical errors, mistakes or other inadvertences not amounting to an error in the construction of the law." *Id.* at 240. This holding addressed the defendant's assertion: "an appraising official utilizing constructed value merely

construes the law and does not deal with facts." *Id.* The issue addressed in *Lester* involved the accuracy of computations used to determine the value of depreciated machinery. This is clearly distinguishable from the facts before this Court which involve the choice of what or whose method to employ in the valuation of depreciated machinery.

The alleged "mistakes" or "errors", which plaintiff challenges here, and interpretational and discretionary decisions of the Customs' Import Specialist; these are "mistakes" or "errors" not intended to be alleviated by § 520(c). *See Hambro Automotive Corp.* v. *United States,* 81 Cust. Ct. 29, C.D. 4761 (1978), *aff'd,* 66 CCPA 113, C.A.D. 1231, 603 F.2d 850 (1979).

The Court of Customs and Patent Appeals set forth the premiere distinctions among mistake of fact, mistake of law, and inadvertence:

> A mistake of fact is any mistake except a mistake of law * * *. It has been defined as a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist * * *. Pomeroy, Equity Jurisprudence section 839 (1941). A 'mistake of fact exists where a person understands the facts to be other than they are, whereas *a mistake of law exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts.*' 58 C.J.S. Mistake section 832.
>
> Inadvertence, on the other hand, is a word of broad meaning * * *. It has been defined variously as an oversight or involuntary accident, or the result of inattention or carelessness, and even as a type of mistake. 42 C.J.S. Inadvertence section 495. It is thus language broader in scope than mistake, [*C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 68 Cust. Ct. 17, 22, C.D. 4327, 336 F. 499 F.2d 1277 (1974) (citations omitted).]

Hambro Automotive, 66 CCPA at 118, 603 F.2d at 853–54.

The Treasury Department has also set forth interpretations of these terms:

> *Mistake of fact* occurs when a person believes the facts to be other than they really are and takes some action based on that erroneous belief. The reason for the belief may be that a fact exists but is unknown to the person or he may be convinced that something is a fact when in reality it is not. For example, an importer's agent may be convinced that the importer wishes him to make a consumption entry for goods and he does so. The true fact is that the importer desired an in-bond entry to be made in the particular case. If the true facts had been known to the agent, an in-bond entry would have been filed.
>
> * * * * * * *
>
> *Error in the construction of a law* occurs when a person knows the true facts of a case but has a mistaken belief of the legal consequences of those facts and acts on that mistaken belief. For example, the exact physical properties of certain merchandise and all other pertinent facts for classification of that

> merchandise are known. In applying the law the merchandise is classified as an entirety but it should have been classified as separate articles. Or the claim is made that an appraiser acted on incomplete information but the appraiser concludes he would have acted in the same way even if the missing information had been before him. If the appraiser errs in such a case, he commits error of law.

94 Treas. Dec. 244, 245–46, T.D. 54848 (1959).

As it stands, Customs' decision to reject plaintiff's depreciated values for Customs' determined depreciated values of the used merchandise could constitute an alleged "mistake" of law, but could not constitute a mistake or error under which relief may be provided pursuant to § 502(c). Plaintiff has failed to state a valid claim under § 520(c) for which relief may be granted.

Conclusion

For the reasons set forth above, plaintiff's motion for summary judgment is denied, and defendant's cross-motion to sever and dismiss and to dismiss for failure to state a claim and for lack of jurisdiction is granted.

(Slip Op. 87–74)

Washington Red Raspberry Commission et al., plaintiffs *v.* United States, et al., defendants

Consolidated Court No. 85–06–00789

Memorandum and Order

[Remanded to International Trade Administration.]

(Dated June 26, 1987)

Kilpatrick & Cody (Joseph W. Dorn and *Anthony H. Anikeeff)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Horgan*); and Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Lisa Koteen*) for the defendants.

Cameron, Hornbostel & Butterman (*William K. Ince*) for intervenor-defendants Abbotsford Growers Co-operative Union, Jesse Processing Ltd. and Mukhtiar & Sons Packers, Ltd.

Aquilino, *Judge:* The defendants have submitted the results of remand proceedings in compliance with the court's Slip Op. 87–29, 11 CIT ——, 657 F. Supp. 537 (1987). Intervenor-defendants Abbotsford Growers Co-operative Union ("Abbotsford"), Jesse Processing Ltd. ("Jesse") and Mukhtiar & Sons Packers, Ltd. ("Mukhtiar") take the position that those results "are fatally flawed because ITA commit-

ted serious errors in the remand proceedings".[1] They specify five such errors.

Defendants' response is a request that this "matter be remanded to the ITA so that it can correct the [four] clerical errors identified".[2] They contend that the other specified error amounts to an untimely cross-claim. The plaintiffs have joined in this argument, not only as to that claimed error, but the other four as well.

The parties were afforded an opportunity to present oral argument in support of their respective positions on June 23, 1987.

I

The court is persuaded by the papers submitted and the oral argument that the four clerical errors identified by the intervenor-defendants must be corrected upon remand to the ITA. Two of the errors—specifically, those the intervenor-defendants enumerate as one[3] and four[4]—appear attributable to the ITA's remand calculations. *See* Defendants' Response, p. 2. Accordingly, contrary to plaintiffs' contention, these challenges are not barred on the basis of their timing.

Errors numbered three[5] and five[6] likewise do not constitute untimely issues. During the court's review of the original dumping determination, the defendants conceded that, in addition to the errors the plaintiffs identified in their motion papers as points F, G and H, the ITA may have committed other "mathematical errors * * * to which plaintiffs ha[d] not alluded."[7] In section "F–H" of their response to plaintiffs' motion for judgment on the record, the defendants had agreed to correct any such errors upon remand to the ITA.[8] The court incorporated this agreement in its remand order by reference to those points "F, G and H". *See* Slip Op. 87–29.

Quite properly, the defendants have recognized again their obligation to correct any mistakes—upon a second remand, which is the route both they and the intervenor-defendants have requested. Any suggestion by plaintiffs' counsel that this court has no choice but to knowingly affirm a determination which the ITA has conceded still contains mistakes is summarily rejected as inimical to the interest of ensuring a just end to the litigation they started.

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[1] Intervenors' Reply to Plaintiffs' Response to Defendants' Redeterminations on Remand [hereinafter cited as "Intervenors' Reply"], p. 2.

[2] Defendants' Response to Intervenors' Comments on Remand Determination [hereinafter cited as "Defendants' Reponse"], p. 6.

[3] "[W]e must challenge [the ITA's] failure to add to 'U.S. price' the *drawback of Canadian import duties* on the drums used by Abbotsford to pack red raspberries." Intervenors' Reply, pp. 3–4 (emphasis in original).

[4] "ITA neglected to make the proper adjustment to Jesse's foreign market value for differences in credit costs between the U.S. and Canadian market." *Id.* at 12.

[5] "ITA has perpetuated a glaring mistake * * * by comparing constructed value with a *Canadian* sale by Jesse * * * to determine its antidumping margin." *Id.* at 11 (emphasis in original).

[6] "ITA omitted all of the Canadian sales of raspberries in pails from its calculation of [Mukhtiar's] foreign market value." *Id.* at 12.

[7] Memorandum of Points and Authorities in Support of Defendants' Partial Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record, p. 42.

[8] *See id.*

II

Intervenor-defendants' second claimed error is that the ITA failed to account for the differentiation in costs associated with producing higher quality raspberries versus "juice-stock" berries in its comparison of Jesse's cost of production with with average home-market sales. The court concludes that this contention, though not untimely in view of Slip Op. 87–29,[9] does not amount to reversible error.

The claim essentially is that differences in the costs attributed to the two grades of raspberries grown at the farms from which Jesse purchased the product under investigation should be reflected in the ITA's methodology, notwithstanding that such a distinction was not reflected in Jesse's transaction prices. That position, however, was rejected by inference in the court's review of the original determination which resulted in the conclusion that the ITA's disregard of those transaction prices was not in accordance with law.

In compliance with Slip Op. 87–29, the ITA used on remand the average price of the raspberries purchased from the farms in calculating Jesse's cost of production. Without evidence indicating that that cost of production was affected by a cost distinction allocated between the two grades of raspberries at the grower level, the court cannot conclude that the ITA did not act in accordance with law by comparing that cost of production with the average price Jesse received on home-market sales of the lower-grade berries. Furthermore, the ITA was not obligated on remand to modify its methodology of comparing cost of production with home-market sales in order to account for such distinctions by factoring in prices Jesse received for a product not under investigation in the calculation of average home-market sales.

III

The plaintiffs have requested that the court order the defendants to "immediately suspend liquidation of Abbotsford's entries pending publication of the redetermination in the *Federal Register*." Plaintiffs' Rebuttal to Intervenors' Reply Brief, p. 13. At oral argument, the defendants offered to acquiesce in this request for a period of 30 days. While this offer is in the interest of orderly further proceedings, the intervenor-defendants, as is their right, have objected to grant of such equitable relief. They contend in their papers filed on June 25, 1987 that the plaintiffs have not met the traditional "four-pronged test"[10] set forth, for example, in *Zenith Radio Corporation* v. *United States*, 710 F.2d 806, 809 (Fed.Cir. 1983). The court concurs.

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[9] The court cannot and therefore does not reach the same conclusion as to the timing of intervenor-defendants' present attempted reliance on *Toho Titanium Co.* v. *United States*, 11 CIT ——, 657 F.Supp. 1280 (1987). *See* section 773(b) of the Trade Agreements Act of 1979, 19 U.S.C. § 1677b(b).

[10] Intervenors' Reply to Plaintiffs [*sic*] and Defendants' Responses to Intervenors' Comments on Remand Determination, pp. 10, 12.

One of the four showings required of applicants like the plaintiffs is their likelihood of success on the merits. The precise issue now in this action is whether, upon further remand, an ITA redetermination of a dumping margin of .42 percent for Abbotsford would be *de minimis* in the light of *Carlisle Tire & Rubber Co.* v. *United States*, 10 CIT ——, 634 F.Supp. 419 (1986). In accordance with that case, resolution of the question is the responsibility of the ITA. In any event, the plaintiffs have failed to convince this court that their view—.42 percent is not *de minimis* on the facts herein—is so likely to prevail as to warrant grant in the interim of the extraordinary relief requested.

Failure to bear the burden on likelihood of success on the merits, or on any one of the other criteria, requires denial of the relief. *See, e.g., Bomont Industries* v. *United States*, 10 CIT ——, 638 F.Supp. 1334, 1340 (1986); *National Corn Growers Association* v. *Baker*, 9 CIT ——, 623 F.Supp. 1262, 1275 (1985); *American Air Parcel Forwarding Company* v. *United States*, 6 CIT 146, 152, 573 F.Supp. 117, 122 (1983). Were the law otherwise, suffice it to state here that the plaintiffs have not satisfied their burden on the three other points either. The request for suspension of liquidation of Abbotsford entries must therefore be denied.

Conclusion

This matter is remanded to the ITA for further proceedings consistent with the foregoing Point I. Corrections of the four clerical errors are to be made on or before July 6, 1987. A disclosure conference among the parties shall take place within three working days thereafter, whereupon the plaintiffs and the intervenor-defendants shall have seven days in which to submit comments to the ITA regarding its corrections. Then the defendants shall have seven days to report to the court their redeterminations of the errors remanded.

So ordered.

(Slip Op. 87–75)

Rhone-Poulenc, Inc., plaintiff *v.* United States, defendant

Court No. 85–5–00722

Before DiCarlo, *Judge.*

Plaintiff challenges the United States Customs Service (Customs) classification of two grades of synthetic silica. Customs classified the merchandise under item 423.00, Tariff Schedules of the United States (TSUS), covering "Other inorganic compounds: * * * Other." Plaintiff contends that the merchandise has the essential characteristics of natural silica and is properly classified in the *eo nomine* provision covering

"silica, not specially provided for," item 523.11, TSUS. Defendant asserts that it would be contrary to legislative intent to include the merchandise in the *eo nomine* provision for silica.

Held: The merchandise has the essential characteristics of natural silica. It is not contrary to legislative intent to include this synthetic merchandise in the *eo nomine* provision for silica. The merchandise is properly classified in item 523.11, TSUS.

[Judgment for plaintiff.]

(Decided June 26, 1987)

Donohue and Donohue (James A. Geraghty) for plaintiff.

Judge Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Department of Justice (*John J. Mahon* and *Susan Handler-Menahem)* for defendant.

DiCarlo, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of two grades of synthetic silica, Ze-O-Sil 125 and Ze-O-35, under item 423.00, Tariff Schedules of the United States (TSUS), covering "Other inorganic compounds: * * * Other." The Court has jurisdiction under 28 U.S.C. § 1581(a) (1982) and holds in favor of plaintiff.

Plaintiff asserts that the merchandise is properly classifiable in the *eo nomine* provision covering "Silica, not specially provided for," item 523.11, TSUS. An *eo nomine* provision includes all forms of the named article unless limited by its terms, or contrary to legislative intent, judicial decisions, long standing administrative practice, or demonstrated commercial designation. *See, e.g., Crosse & Blackwell Co.* v. *United States,* 36 CCPA 33, C.A.D. 393 (1948). An *eo nomine* provision for a naturally occurring substance also includes the substance when artificially produced when the artificial product contains characteristics essentially similar to the natural product. *See, e.g., Christensen Diamond Products Co.* v. *United States,* 54 Cust. Ct. 221, C.D. 2537, 243 F. Supp. 212, *appeal dismissed,* 53 CCPA 155 (1965).

After trial, the Court made a finding of fact that the synthetic products at issue have the essential characteristics of natural silica. The only question remaining is whether defendant is correct in its assertion that it would be contrary to legislative intent to include the subject merchandise within this *eo nomine* provision for silica.

Defendant first argues that the legislative history indicates that Congress intended only mineral silica to be covered by item 523.11, TSUS. In support of this position, defendant cites to paragraph 207 of the Tariff Act of 1922, a predeccessor to item 523.11, TSUS, which covered:

> Clays or earths, unwrought or unmanufactured, including common blue clay and Gross-Almerode glass pot clay, not specially provided for, $1 per ton; wrought or manufactured, not specially provided for, $2 per ton; china clay or kaolin, $2.50 per ton; bauxite, crude, not refined or otherwise advanced in condition in any manner, $1 per ton; fuller's earth, unwrought and unmanufactured, $1.50 per ton; wrought or manufactured, $3.25 per ton; silica, crude, not specially provided for, $4 per

> ton; silica, suitable for use as a pigment, not specially provided for, $7.50 per ton; fluorspar, $5.60 per ton.

Defendant claims the other categories of merchandise mentioned are mineral materials, and therefore Congress intended that only mineral silica and not artificial silica be covered by paragraph 207 under the doctrine of *noscitur a sociis* (the meaning of a word may be ascertained by reference to the meaning of words associated with it), citing *United States* v. *Imperial Wall Paper Co.,* 14 Ct. Cust. App. 280, 283, T.D. 41886 (1926). Defendant also relies on the legislative history to the Tariff Act of 1930 which describes silica only in terms of a natural substance obtained from the ground. *See Summary of Tariff Information 1929,* Schedule 2, 457–458, 461–462 (1929).

If the Court were interpreting the Tariff Act of 1922 or 1930, defendant's arguments might prove persuasive. The Court is concerned, however, with item 523.11 of the TSUS enacted in 1962. Legislative history for the TSUS reveals Congress was seeking to combine separate provisions for silica under a single *eo nomine* provision:

> Item 523.11 embraces silica, not specially provided for. Crude silica is currently dutiable at $1.75 per tone under the provisions of paragraph 207, and silica not specially provided for is duty free under paragraph 1775. Under current rulings (CD 68; CIE 2283/57), silica crushed and screened to a specific size for a specific use has been held to be not crude and, therefore, entitled to free entry under paragraph 1775. In view of this ruling, it is likely that practically all future imports of silica will be free of duty. Imports of crude silica have been negligible for many years. In 1955, the latest years imports of crude silica were reported, they amounted to $710. Inasmuch as the provision for silica in paragraph 207 is not effective, it is being dropped.

7 *Tariff Classification Study: Explanatory and Background Materials,* Schedule 5, 36–37 (1960).

At the time of the adoption of the TSUS, the rule that an *eo nomine* provision not specifically limited covers a synthetically produced form of the named item already was judicially established. *See A.N. Deringer, Inc.* v. *United States,* 38 Cust. Ct. 327, 330–331, C.D. 1882 (1957) (and cases cited therein). Absent any definite legislative history indicating a contrary intent for the *eo nomine* provision for silica, the Court will not ignore established precedent holding that an unqualified provision for a natural product covers an essentially similar artificial product.

Defendant claims that the subject merchandise is similar to what was once commonly referred to and understood to be silicic acid. Defendant maintains that the legislative history of silicic acid demonstrates it was provided for separately and its predecessor provisions eventually were subsumed into item 416.45, TSUS, covering "Inorganic acids: * * * Other." Based upon the manner in which the sub-

ject merchandise is created, however, defendant asserts that it is more like an anhydride than an acid and argues that pursuant to Headnote 1 to Schedule 4, part 2, subpart B the merchandise is properly classified "conceptually" as the anhydride of silicic acid in item 423.00, TSUS, which covers "Other inorganic compounds: * * *. Other." Headnote 1 to Schedule 4, part 2, subpart B states: "This subpart covers monobasic, diabasic, and polybasic inorganic acids. Salts and anhydrides of these acids are provided for in subpart C of this part."

Whether or not the Court accepts defendant's position that the subject merchandise is an anhydride of silicic acid, the Court finds that Congress did not intend an anhydride of silicic acid to be classified in the basket provision for inorganic compounds, under item 423.00, TSUS.

The legislative history of item 423.00, TSUS states in part: "Item 423.00 covers other inorganic chemical compounds. This 'basket' item contains chemicals formerly provided for in paragraphs 5, 82, 1601, and 1737 of the present tariff act [the Tariff Act of 1930]." 6 *Tariff Classification Study: Explanatory and Background Materials,* Schedule 4, 57 (1960). Item 1601 of the Tariff Act of 1930, derived from item 1501 of the Tariff Act of 1922, covered certain acids and acid anhydrides, including certain of the acids covered in subpart B, Schedule 4, part 2 governed by Headnote 1 such as hydrochloric, hydrofluoric, nitric, and sulfuric, but item 1601 did not cover silicic acid or its anhydrides.

As defendant pointed out in its brief, the legislative history of silicic acid and anhydrides thereof shows that these were placed only in paragraph 1 of the Tariff Act of 1922 which later became paragraph 1 of the Tariff Act of 1930. Item 423.00, TSUS was not derived from paragraph 1 of the Tariff Act of 1930. From this legislative history, the Court concludes that Congress did not intend to have an anhydride of silicic acid classified in item 423.00, TSUS.

Also, silica (SiO_2) is the only anhydride of silicic acid of which the Court is aware. *See Merck Index of Chemicals and Drugs,* Seventh Ed. 934 (1960) (defining silica as "Silicon dioxide; silicic anhydride. SiO_2 * * *"). Silica is specially provided for *eo nomine* under item 523.11, TSUS. Since the Court has found that the subject merchandise has the essential characteristics of silica, even if it were considered silicic anhydride, Headnote 1 of Schedule 4, Part 2 would be controlling. That headnote states that "This part covers chemicals, except those provided for elsewhere within this schedule *and those specially provided for in any of the other schedules* [emphasis added]."

In light of these findings and after review of all the relevant legislative history, the Court is not persuaded that Congress intended to limit the *eo nomine* provision for silica so as to exclude an artificial silica such as the merchandise at issue. The Court holds the subject

merchandise to be properly classified under item 523.11, TSUS. Judgment will be entered accordingly. So ORDERED.

(Slip Op. 87-76)

FERROSTAAL METALS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-12-01610

Before DICARLO, *Judge.*

Plaintiff contests the denial of a protest challenging a notice of redelivery issued by the United States Customs Service (Customs) requiring that merchandise consisting of continuous hot-dipped galvanized steel sheet entered at the Port of Seattle be redelivered to Customs custody on the grounds that plaintiff did not provide necessary Japanese export certificates required under a voluntary restraint arrangement concluded between the governments of the United States and Japan. Customs issued the notice based on its finding that the merchandise is not a product of New Zealand as stated in the entry documents, but rather a product of Japan since operations performed on the steel sheet in New Zealand did not constitute a substantial transformation of the merchandise for country of origin purposes.

Held: Plaintiff is not required to provide Japanese export certificates since the merchandise is a product of New Zealand. The continuous hot-dip galvanizing process changes the name, character and use of Japanese full hard cold-rolled steel sheet, resulting in a substantial transformation of the merchandise.

[Judgment for plaintiff.]

(Decided June 26, 1987)

Baker & McKenzie (William D. Outman, II, Thomas Peele and Thomas P. Ondeck) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice, for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* The question presented in this case is whether plaintiff's importation of steel sheet which has been annealed and galvanized in New Zealand by a process known as "continuous hot-dip galvanizing" using full hard cold-rolled steel sheet from Japan is covered by the Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Certain Steel Products ("Arrangement"). The Court holds that the merchandise is not covered by the Arrangement since the operations performed in New Zealand constituted a substantial transformation of the Japanese full hard cold rolled steel sheet.

I

Plaintiff entered merchandise at the Port of Seattle on July 17, 1986, August 26, 1986 and September 19, 1986 consisting of unpainted galvanized steel sheet galvanized in New Zealand by the

continuous hot-dip galvanizing process, and painted galvanized steel sheet galvanized and painted by coilcoating in New Zealand. The material which was subjected to the continuous hot-dip galvanizing process to produce the galvanized (or galvanized and painted) steel sheet was full hard cold-rolled steel sheet from Japan. Plaintiff's entry documents identified New Zealand as the exporting country and the country of origin.

On October 24, 1986, the District Director of Customs at the Port of Seattle issued a notice of redelivery requiring redelivery of the entered merchandise unless plaintiff furnished Customs a Japanese export certificate issued pursuant to the Arrangement. The notice of redelivery was based on a ruling issued by Customs on August 25, 1986 that continuous hot-dip galvanizing, with or without painting, is not a process that results in a substantial transformation so as to change the country of origin of full hard cold-rolled steel sheet.

On November 26, 1986, approximately one month after issuance of its notice of redelivery, plaintiff filed a timely protest contesting issuance of the notice. Attached to the protest was a 17-page memorandum detailing plaintiff's argument that the steel sheet was not covered by the Arrangement since it had been substantially transformed in New Zealand. The protest was denied on December 2, 1986 on the basis of the earlier customs ruling.

Plaintiff filed a summons and a complaint setting forth a claim under section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (1982), contesting the denial of the protest and the administrative decision of Customs as applied to the protested entries. Plaintiff simultaneously moved for an order to show cause why a preliminary injunction should not issue (1) to permit, free of any requirement of export certificates, entry and delivery to its United States customers of steel sheet which had arrived in or was en route to the United States before plaintiff learned of the applicable customs ruling, and (2) to permit, free of any requirement of export certificates, entry and sale of the subject merchandise during the pendency of this action. Jurisdiction was alleged under 28 U.S.C. §§ 1581(a) and (i).

At oral argument on the motion for a preliminary injunction, plaintiff offered proof that the merchandise was susceptible to corrosion and argued that the customs ruling effectively prevented plaintiff from delivering similar merchandise en route to the United States and merchandise subject to other protests not yet denied and incapable of review under section 1581(a). The Court did not issue an injunction, however, on the ground that the injunction would grant the ultimate relief sought by plaintiff. The Court consolidated the motion with the trial on the merits and ordered expedited review. Trial was held from March 9 through March 12, 1987, and briefing was completed on June 10, 1987.

II

This case is one which comes within the exclusive jurisdiction of the Court under 28 U.S.C. § 1581(a) (1982), which covers "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515]." Section 1515 authorizes the review of protests filed under section 1514 challenging "decisions of the appropriate customs officer, including the legality of all orders and findings entering the same, as to—* * * (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws * * *." 19 U.S.C. § 1514(a)(4) (1982). Thus, the customs ruling forming the basis for the issuance of the notice of redelivery is subject to review in this action under section 1581(a). Under 28 U.S.C. § 2640(a)(1) the present case is a *de novo* proceeding, and the decision of the customs official at issue is presumed to be correct under 28 U.S.C. § 2639(a)(1).

The Court declines to exercise jurisdiction under 28 U.S.C. § 1581(i), the so-called residual jurisdiction of the Court. The Court exercises jurisdiction under section 1581(i) rarely, such as when the relief available in an action brought under section 1581(a) would be manifestly inadequate or when necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies. *Lowa, Ltd.* v. *United States,* 5 CIT 81, 561 F. Supp. 441 (1983), *aff'd,* 724 F.2d 121 (Fed. Cir. 1984). *United States Cane Sugar Refiners' Ass'n* v. *Block,* 3 CIT 196, 544 F. Supp. 883, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982); *Springfield Industries Corp.* v. *United States,* 11 CIT ——, 655 F. Supp. 506 (1987).

There is no futility in exhausting administrative remedies where the protest challenges a substantial transformation decision promulgated and subject to reconsideration by Customs. Furthermore, the current reviewability of the August 25, 1986 Customs ruling belies any perceived inadequacy or unjustifiable delay associated with the jurisdiction provided under section 1581(a). As such, jurisdiction under section 1581(a) provides plaintiff an adequate remedy notwithstanding that the action covers only the entries that are the subject of the protest denied by Customs.

III

The Court turns to the dispositive question whether the operations performed in New Zealand on full hard cold-rolled steel sheet from Japan involved a substantial transformation, thereby rendering the imported steel a product of New Zealand.

Substantial transformation is a concept of major importance in administering the customs and trade laws. In addition to its role in identifying the country of origin of imported merchandise for purposes of determining dutiable status, or, as in this case, the applica-

bility of a bilateral trade agreement, substantial transformation is the focus of many cases involving country of origin markings, *see, e.g., National Juice Products Ass'n* v. *United States,* 10 CIT ——, 628 F. Supp. 978 (1986), and cases involving American goods returned, *see, e.g., Upjohn Co.* v. *United States,* 9 CIT ——, 623 F. Supp. 1281 (1985).

The essence of these cases is that a product cannot be said to originate in the country of exportation if it is not manufactured there. The question, therefore, is whether operations performed on products in the country of exportation are of such a substantial nature to justify the conclusion that the resulting product is a manufacture of that country. "Manufacture implies a change, but every change is not manufacture * * *. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'" *Anheuser-Busch Brewing Ass'n* v. *United States,* 207 U.S. 556, 562 (1908). The criteria of name, character and use continue to determine when substantial transformation has occurred, and the prior cases of this court and our predecessor and appellate courts provide guidance in the application of this test.

The Court finds it necessary to address two arguments raised by defendant before applying the criteria to the merchandise in question. These are (1) that name, character and use provide only part of the controlling test of whether the "essence" of the product has been altered, which may not be satisfied despite changes in name, character and use; and (2) even though changes have occurred which would ordinarily result in a finding of substantial transformation, a different result may be found in the context of an agreement designed to restrict imports, where the Court may apply different criteria requiring more substantial changes in the imported product.

Defendant's suggestion that an "essence" test has displaced name, character and use is attributed to the Court's decisions in *National Juice Products, supra,* and *Uniroyal, Inc.* v. *United States,* 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983). In *National Juice Products,* however, the Court specifically applied the criteria of name, character and use in determining that orange juice manufacturing concentrate is not substantially transformed in the process that converts the concentrate into frozen concentrated, or reconstituted, orange juice. Although the Court used the word "essence" in describing the character of the merchandise, the focus of the Court's analysis was the traditional character criterion: "The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale, does not change the fundamental character of the product, it is still essentially the product of the juice of oranges." 628 F. Supp. at 991.

Uniroyal held that footwear uppers were not exempted from country of origin marking requirements since the attachment of outsoles to the uppers did not constitute a substantial transforma-

tion within the meaning of 19 C.F.R. §§ 134.1(d) and 134.35. While the Court referred to the uppers as "the very essence of the completed shoe," it made clear that "the test to be applied is whether the imported article has undergone a 'substantial transformation' which results in an article having a name, character or use differing from that of the imported article." 3 CIT at 224, 542 F. Supp. at 1029–30.

The Court finds that there is no basis in caselaw for the essence test offered by defendant. Defendant cites no case where the name, character and use criteria were satisfied, yet no substantial transformation was found to have occurred. The name, character and use test is entitled to continued adherence in view of its affirmance in recent opinions by our appellate court. *See Torrington Co.* v. *United States,* 764 F.2d 1563 (Fed. Cir. 1985); *Belcrest Linens* v. *United States,* 741 F.2d 1368 (Fed. Cir. 1984).

The argument that the Court should apply a more stringent test depending on the context in which the substantial transformation issue arises is similarly misplaced. Defendant says that "decisions of the courts hold that the various criteria applied in substantial transformation cases must be considered in light of the objectives of the statute in question * * *. Thus, in this case, where the purpose of the VRA and its statutory foundations is to limit imports of Japanese steel products and to foster the growth of the American steel industry, the nature of the overall changes which occur to the product in New Zealand must be more substantial than when a statute fostering operations in a foreign country are being construed." Posttrial brief for defendant at 33.

Among the cases cited by defendant is *National Juice Producers, supra,* which provides a footnote referring to three statutes involving substantial transformation. The Court found the language of tests applying the statutes "similar" and predicted that results under the tests may differ "where differences in statutory language and purpose are pertinent." 628 F. Supp. at 988–89, n.14. However, none of the cases cited even remotely suggests that the Court depart from policy-neutral rules governing substantial transformation in order to achieve wider import restrictions in particular cases.

In this case, the bilateral agreement between the United States and Japan is designed to limit steel imports from Japan, not to limit imports of steel generally. Under these circumstances the standard rule for substantial transformation should be applied to determine whether steel is covered by the Arrangement. No legitimate purpose is served by employing some other test in order to bring within the terms of the Arrangement steel which the United States has not attempted to restrict. As a practical matter, multiple standards in these cases would confuse importers and provide grounds for distinguishing useful precedents. Thus, the Court applies the substantial transformation test using the name, character and use criteria in accordance with longstanding precedents and rules.

All of the merchandise involved was galvanized in New Zealand. Galvanizing involves coating the steel with zinc so as to improve its resistance to rust. The merchandise also underwent a process of annealing which restores the ductility of the steel which is lost in the cold rolling process performed in Japan. Other operations such as painting were performed on some but not all of the merchandise. Thus, if the galvanizing and annealing processes result in a substantial transformation of the merchandise, there is no need to consider the effect further operations have in transforming some, but not all, of the merchandise.

Whether galvanizing and annealing change the character of the merchandise depends on the nature of these operations and their effect on the properties of the materials. In making this determination the Court makes the following factual findings. Annealing is the first step in the continuous hot-dip galvanizing process. This step involves the controlled heating and cooling of the steel sheet in a furnace which relieves the deformation energy in full hard-cold rolled steel sheet and makes the steel less strong, but more ductile, or formable. The furnace has 20 different zones correlating to various time and temperature patterns. To produce one of the types of imported sheet, known in the industry as ASTM A446 Grade A, the sheet must be heated to 1350°F, at which point recrystalization of the grains of steel occurs. The sheet is then brought down to 880°F, before galvanizing begins.

Other grades of imported sheet are heated to as much as 1450°F or only to 1050°F before cooling to 880°F, depending on the degree of strength and formability sought in the end product. Although the process affects the distribution of carbon and nitrogen in the sheet, annealing does not change the actual chemical composition and dimensions of the sheet. "Recrystalization annealing," which describes the process applied to ASTM A446 Grade A, substantially eliminates defects in the sheet. "Recovery annealing," used to produce ASTM A446 Grade E, is heated only to 1050°F, and also reduces defects in the sheet. But in the view of one of plaintiff's witnesses, recovery annealing, although more difficult to carry out due to the importance of temperature control, results in a transformation less substantial than that resulting from recrystalization annealing, since steel grains do not form, grow or change shape during recovery annealing. Transcript at 254–57.

At 880°F, the sheet enters a pot of molten zinc and is dipped. The molten zinc reacts immediately with the solid steel, and begins a process known as "alloying." Alloying constitutes a chemical change in the product, characterized by the formation of iron-zinc alloys at the interface between the steel and the zinc. Tr. at 127–28. The galvanized steel sheet emerging from the bath has a mixed zinc-steel surface with an identifiable atomic pattern. The formation of a galvanized surface is an irreversible process which provides electrochemical protection to the sheet. As a result of the gal-

vanic protection, the steel will last up to twenty years, or ten times as long as ungalvanized steel.

Defendant argues that the continuous hot-dip galvanizing process is merely a "finishing" process carried out to improve certain performance characteristics of the steel sheet. The government's sole witness testified that dimension and shape are the important characteristics distinguishing different steel products. Tr. at 552–56. According to defendant, annealing, which significantly alters mechanical properties, does not involve a substantial transformation since affects properties that are inherent in the steel.

The Court is not persuaded that annealing cannot contribute to a substantial transformation merely because steel is inherently susceptible to changes in ductility. The Court finds that strength and ductility constitute important characteristics of the steel and that annealing significantly affects the character by dedicating the sheet to uses compatible with the strength and ductility of the steel. A change in the end uses of products, *see infra,* is itself indicative of a change in the character of the product. *United States* v. *International Paint Co.*, 35 CCPA 87, C.A.D. 376 (1948).

The Court has held in another context that annealed sheet glass became a different commercial article when it underwent a tempering process in Canada. In *Guardian Industries Corp.* v. *United States,* 3 CIT 9 (1982), the Court held that by increasing tensions and stresses in the annealed glass through a process of heating and rapid cooling, the resulting tempered glass was transformed "in name, use, performance characteristics and tariff classification." *Id.* at 16. The Court considered in particular that while annealed glass can withstand approximately 7,000 pounds of pressure per square inch, tempered glass can withstand approximately 22,000 pounds of pressure per square inch. *Id.* at 11. In this case, such change also results from the annealing process. Whereas full hard colled rolled steel sheet has a strength of approximately 80,000 pounds per square inch, after annealing the sheet has a strength of between 28,000 and 60,000 pounds per square inch depending on grade. Tr. at 605–06.

Defendant also minimizes the effect of galvanizing on the character of steel sheet. Its witness described zinc coating as one of many forms of coating which have the common function of protecting a steel sheet so that it can be used for its intended purpose. Zinc coating has a single function, which is "to protect the steel sheet when it's being used in a variety of different applications to protect it from corrosion." Tr. at 558. According to defendant, the steel itself, with all its inherent properties constitutes the essence of the product, while zinc coating is merely a finishing operation designed to protect the steel.

The Court does not agree with the argument that zinc coating is insignificant because a substantial transformation cannot occur in steel sheet once it is shaped. The alloy-bonded zinc coating affects

the character of the sheet by changing its chemical composition and by providing corrosion resistence.

The Court also finds that the hot-dip galvanizing process is substantial in terms of the value it adds to full hard cold-rolled steel sheet. The evidence showed that the Japanese product is sold for approximately $350 per ton, while the hot-dipped galvanized product is sold for an average price of $550 to $630 per ton. Tr. at 114, 190–91, 278.

Taken as a whole, the continuous hot-dip galvanizing process transforms a strong, brittle product which cannot be formed into a durable, corrosion-resistant product which is less hard, but formable for a range of commercial applications. Defendant's witness stated that the imported sheet has a "different character from the standpoint of durability." Tr. at 612. The Court finds that the annealing and galvanizing processes result in a change in character by significantly altering the mechanical properties and chemical composition of the steel sheet.

The Court also finds substantial changes in the use of the steel sheet as a result of the continuous hot-dip galvanizing process. Testimony at trial overwhelmingly demonstrated that cold-rolled steel is not interchangeable with steel of the type imported, nor are there any significant uses of cold-rolled sheet in place of annealed sheet. Tr. at 170, 230, 258, 363, 412–13. Defendant's witness stated that the frequency with which the two types of steel compete with or are interchangeable with each other is "very limited," perhaps less than one or two percent. Tr. at 647.

Witnesses having expertise with respect to the construction and building industry testified as to the lack of interchangeability between the products, and stated that building codes governing various building and construction applications would nonetheless prevent substitution by requiring that galvanized products be used. Tr. at 428–33.

The inability to form full cold rolled steel sheet also prohibits its substitution for annealed steel sheet. Testimony showed that in the automobile industry only annealed steel, and not cold-rolled steel, can be used to make parts that require at least a moderate amount of forming, such as fenders. Tr. at 282–84.

Finally, despite conflicts in the testimony of the parties' witnesses concerning the applicability of the terms "semi-finished" and "finished" to the products before and after processing, it is clear that while continuous hot-dipped galvanized steel can be put to a variety of end uses, the evidence showed that with very few exceptions, cold rolled steel is not put to end uses without some form of heat treatment. Tr. at 664–65. Such a change in the utility of the product is indicative of a substantial transformation. *See Midwood Industries, Inc.* v. *United States,* 64 Cust. Ct. 499, C.D. 4026, 313 F. Supp. 951, *appeal dismissed,* 57 CCPA 141 (1970) (transition from "producers' goods" to "consumers' goods"). Based upon all of the evidence

presented, the Court finds that the continuous hot-dip galvanizing process causes a change in the use of the steel sheet.

The name criterion is generally considered the least compelling of the factors which will support a finding of substantial transformation. *National Juice Producers,* 628 F. Supp. at 989, ("a change in the name of the product is the weakest evidence of a substantial transformation"); *see Uniroyal, Inc.* v. *United States,* 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd* 702 F.2d 1022 (Fed. Cir. 1983); *United States* v. *International Paint Co.*, 35 CCPA 87, C.A.D. 376 (1948). Nonetheless, the satisfaction of the name criterion in this case lends support to plaintiffs' claim. The witnesses for both parties testified that the processing of full hard cold-rolled steel sheet results in a product which has a different name, continuous hot-dip galvanized steel sheet. Tr. at 135, 612.

The Court also considers relevant whether the operations underlying the asserted transformation have effected a change in the classification of the merchandise under the Tariff Schedules of the United States (TSUS). Change in tariff classification may be considered as a factor in the substantial transformation analysis. *Belcrest Linens,* 741 F.2d at 1372–73; *see Chemo Puro Mfg. Corp.* v. *United States,* 34 Cust. Ct. 8, C.D. 1668, 146 F. Supp. 178 (1954). Here this factor supports a substantial transformation. Full hard cold-rolled steel sheet is classified under item 607.83, TSUS, while continuous hot-dip galvanized steel sheet is classifiable under item 608.13, TSUS.

Based on the totality of the evidence, showing that the continuous hot-dip galvanizing process effects changes in the name, character and use of the processed steel sheet, the Court holds that the changes constitute a substantial transformation and that hot-dipped galvanized steel sheet is a new and different article of commerce from full hard cold-rolled steel sheet.

One further argument of defendant's remains to be discussed. Defendant says that "the Government's position here as to the scope of the VRA, regardless of whether there has been a substantial transformation, is that it covers an arrangement product, so long as any processing does not take an article out of a product category covered by the VRA." Post-trial brief for defendant at 27 n.8. This apparently would mean that regardless whether imported steel is, under the law, a product of a country other than Japan, Customs may require that importers present Japanese export certificates whenever the new and different articles of commerce resulting from a substantial transformation happen to be covered by another provision of the Arrangement. This argument flows from defendent's position that given a broad interpretation of the Arrangement's purpose to "restrain exports * * * destined for consumption in the United States of America of products * * * originating in Japan" the Court should find that all imported steel products made from Japanese substrate are destined for consumption in the United

States and thus covered by the Arrangement. Defendant argues that this finding is particularly appropriate in this case, in light of evidence that the Japanese steel used for processing in New Zealand is sized to special inch dimensions required by United States customers, which demonstrates that the steel is destined for the United States before it is shipped to New Zealand.

The Court concludes that this rationale is not germane to the issues in this case. Only in defendant's briefs does such an interpretation of the Arrangement appear. Defendant fails to show that this position played any role in causing the issuance of the notice of redelivery, relying instead on the proposition that "subsumed in the decision is a presumption that all facts necessary to the conclusion were found to exist." Pretrial brief for defendant at 8 (citing *New York Merchandise Inc.* v. *United States*, 59 CCPA 127, C.A.D. 1052, 459 F.2d 1047 (1972)).

Defendant's theory was neither capable of constituting a factual finding nor necessary to the conclusion of the appropriate Customs official that redelivery notices should issue. Customs decision was based solely on a substantial transformation analysis.

Defendant's argument that substantial transformation rules do not govern country of origin decisions under the Arrangement also appears to have been contradicted by the consultations between the governments of the United States and Japan concerning the Arrangement. The United States stated that there were several options available to third countries faced with problems as a result of processing Japanese steel covered by the Arrangement: "These countries could (1) challenge the U.S. Customs ruling on substantial transformation, (2) obtain Japanese certificates or (3) negotiate VRA's with these countries, providing for a certain amount of Japanese origin steel."*Minutes—U.S.-Japan Consultations—Tokyo, Dec. 1–2, 1986* (Exhibit 30, Doc. C). The controlling nature of substantial transformation rules is shown further by the Japanese complaint that Customs rulings on substantial transformation are "ex post facto to the U.S.-Japan Arrangement," and that if Japan were responsible for issuing certificates for steel processed in third countries, "its ceiling under the Arrangement should be increased." *Id.*

Other sources contradict defendant's position that substantial transformation is immaterial. For example, in a letter to the president of an association of steel service centers dated February 26, 1987, the Acting Director of the Classification and Value Division of the United States Customs Service stated on behalf of the government that: "Under the origin requirements of the VRA's, a steel product remains a product of the country in which it was produced unless it is substantially transformed by processing in another country." The Court holds that defendant's argument concerning the scope of the Arrangement and the materiality of the substantial transformation rules is erroneous.

IV

In conclusion, the Court holds that the customs ruling that Japanese full hard cold-rolled steel sheet is not substantially transformed by continuous hot-dip galvanizing in New Zealand is erroneous, and that issuance of the notice of redelivery covering the entries that are the subject of this case was improper. Defendant's motion for a stay of judgment is denied. Judgment will be entered accordingly. So ORDERED.

(Slip Op. 87-77)

OMNI U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-2-00256

[Defendant's motion for summary judgment is granted.]

(Decided June 30, 1987)

Barnes, Richardson & Colburn (Andrew P. Vance), for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(Sheila N. Ziff),* Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* Plaintiff, an importer of metal fasteners from Japan, challenges denial of a protest of a refusal to reliquidate. The parties cross-move for summary judgment.

FACTS

In June 1979, the Treasury Department published in the Federal Register an order covering certain industrial fasteners from Japan. 44 Fed. Reg. 31972 (June 4, 1979) (T.D. 79-158). The order required deposit of estimated countervailing duties (CVD), indicated that the net amount would be reviewed "upon receipt of information of the precise benefit received * * *," and purported to be a "Countervailing Duty Order." 44 Fed. Reg. at 31972.

Prior to the liquidation of the entries at issue, the administration of the CVD program was transferred to the Department of Commerce (Commerce) by Executive Order No. 12188, effective January 2, 1980. Exec. Order No. 12188, 3 C.F.R. 131 (1981), *reprinted in* 19 U.S.C § 2171 app. at 968-69 (1982). In May 1980, Commerce published a notice of its intention to review, on an annual basis, all CVD orders then in existence. Although the parties agree that the fasteners covered by T.D. 79-158 were intended to be included in the notice, the attached list of existing orders to be reviewed did not

mention T.D. 79–158. Customs thus continued liquidating entries of Japanese fasteners at the duty rate set forth in the CVD order.

Liquidation of all of the entries at issue occurred in 1980. On October 13, 1982, plaintiff filed a request for reliquidation essentially seeking reliquidation at the rate to be established by the 1980 annual review determination. A review decision relating to the year 1979 alerted plaintiff to the lower duty rate to be expected. This rate was later set at zero, as opposed to the original four percent estimated figure. 48 Fed. Reg. 4864 (February 3, 1983). Reliquidation was denied as untimely requested. Protest of the refusal to reliquidate was denied on September 9, 1985. Suit was filed here on February 26, 1986, challenging that denial.

Arguments

19 U.S.C. § 1520(c) (1982) allows reliquidation despite failure to file a timely (within ninety days of liquidation) protest of liquidation under 19 U.S.C. § 1514 (1982 & Supp. III 1985) if a mistake of fact affecting the liquidation is brought to Customs' attention within one year of the liquidation. Plaintiff concedes that it did not file its request for reliquidation within one year of the 1980 liquidations. Plaintiff argues instead that the original liquidations may not stand because they are void. Plaintiff's voidness argument is based on the CVD laws.

Plaintiff argues that the original order, T.D. 79–158, required estimates only and never directed liquidation. Furthermore, plaintiff argues no liquidation was possible once authority for CVD cases was transferred to the Commerce Department, whereupon new regulations were issued governing cases subject to Treasury Department orders. Regulations governing the "transition" cases were promulgated on January 22, 1980. The regulations made all outstanding CVD orders subject to annual review. 19 C.F.R. § 355.41(a) (1981).[1] As indicated, the following May the Commerce Department actually ordered the annual reviews. The parties seem to be in agreement that once annual review was ordered the basic principles of 19 U.S.C. §§ 1671d and 1675 (1982 & Supp. III 1985) applied and liquidation implicitly was ordered suspended. There is some disagreement as to the legal necessity of suspension of liquidation at earlier stages, but it is clear that the post-May 1980 liquidations were not authorized.

Although defendant does not concede that the liquidations were illegal and void, it seems clear that defendant's main argument is that "illegal" or not, at some point a posted "liquidation" finally resolves the question of the amount of duties owing on an entry, and at that point judicial relief is not available.

[1] This provision requiring annual review in all cases was deleted after the time period at issue here. 50 Fed. Reg. 32559 (Aug. 13, 1985). *See* 19 U.S.C. § 1675 (Supp. III 1985).

Suit Predicated on 28 U.S.C. § 1581(a) Jurisdiction

Basically, there are two jurisdictional provisions under which plaintiff might proceed in order to obtain relief. One is 28 U.S.C. § 1581(a) (1982), providing for judicial review of a denial of a protest. Plaintiff clearly filed suit in a timely manner after its protest of the reliquidation decision was denied. Plaintiff, however, may obtain no relief if its underlying reliquidation request under 19 U.S.C. § 1520(c) was untimely.[2] Except in a few inapplicable situations, only a timely section 1520(c) request will stay the finality of a liquidation once ninety days have passed without the filing of a protest of the liquidation. 19 U.S.C. § 1514(a).

Plaintiff argues that its request was timely because the liquidation, having not yet occurred legally, could not start the running of the section 1520(c) time period. Unfortunately for plaintiff, such attempts to avoid the administrative time limits which condition suit under 28 U.S.C. § 1581(a), have been rejected in a decision of one of the predecessors of the Court of Appeals for the Federal Circuit, *United States* v. *A.N. Deringer, Inc.*, 66 CCPA 50, 593 F.2d 1015 (1979). In *Deringer*, contrary to a regulation, liquidation occurred early.[3] It was not protested timely. The court held that challenges to the *legality* of liquidations must be made through the protest route. Sections 1514(a) and 1520(c) are both part of that route and their time limits apply. As far as suit under section 1581(a) is concerned, the court cannot distinguish *Deringer* from the case at hand.

Suit Predicated on 28 U.S.C. § 1581(i) Jurisdiction

In several recent related opinions the court assumed jurisdiction and ordered collection of additional duties following final liquidation where *ultra vires* acts had resulted in improper liquidation. *National Corn Growers Assoc.* v. *Baker,* 9 CIT ——, Slip Op. 85–98, at 5–6 (Sept. 20, 1985), 9 CIT ——, 623 F. Supp. 1262, 1266–71 (1985), 10 CIT ——, 636 F. Supp. 921, *rehearing denied,* 10 CIT ——, 650 F. Supp. 172 (1986), *appeal docketed,* No. 87–1147 (Fed. Cir. Jan. 14, 1987). The court relied on 28 U.S.C. § 1581(i) (1982), the residual jurisdiction provision, and 28 U.S.C. § 1585 (1982), which gives the court all of the equitable powers of a district court.[4] The court found as a preliminary matter, however, that the traditional means of obtaining judicial review were unavailable or "manifestly inadequate." *See United States* v. *Uniroyal,* 69 CCPA 179, 187, 687 F.2d 467, 475 (Nies, J. concurring).

In another case, *Miller and Co.* v. *United States,* 8 CIT 281, 598 F. Supp. 1126 (1984), *appeal docketed,* No. 87–1083 (Fed. Cir. Nov. 26, 1986), the court stated that under certain narrow circumstances, if

[2] 19 U.S.C. § 1520(c) allows correction of factual or clerical error if Customs is advised of the error within one year of liquidation or exaction. Plaintiff does not argue that no exaction occurred. Its argument is limited to the "nonexistence" of liquidation.

[3] The liquidations in *Deringer* were as "illegal" or "ultra vires" as the ones at issue here.

[4] Sections 1581(i) and 1585 were not in effect at the time of *Deringer*.

an action undertaken in administering the CVD laws is *ultra vires*, plaintiff may be relieved of its duty to participate in the administrative proceedings required for 28 U.S.C. § 1581(c) (1982) jurisdiction, but may proceed under section 1581(i). The *Miller* case differs significantly from the one at hand, not because it involves 28 U.S.C. § 1581(c) as opposed to (a), but because the opinion was based on the premise that it would be inappropriate and futile to require plaintiff to appear before an agency which in connection with the issue at hand consciously acted in a patently "*ultra vires*" way. 8 CIT at 286, 598 F. Supp. at 1131. In other words, the administrative remedy would not be legally adequate in such a situation.[5] In this case, it would not have been futile for plaintiff to assert its objection by way of protest. The agency's unauthorized action was both inadvertent and overt and thus should have been protested in 1980.

Plaintiff argues that as a matter of fact, if not law, it was deprived of its protest right because it was not alerted to look for liquidation at a time when liquidation legally could not occur. The answer is the same as it was in *Deringer*. The importer has the burden to check for posted notices of liquidation and to protest timely. Plaintiff did not make out a case of no valid notice. Accordingly, there is no legally sufficient element of surprise which rendered the normal administrative avenues unavailable here.

The court finds the case of *Star Sales Distributing Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–117 (Nov. 7, 1986) dispositive.[6] In an almost identical action to the one at hand the court rejected section 1581(i) jurisdiction because, unlike the situation in *National Corn Growers*, the traditional remedies were legally adequate. The court found that there was no basis for granting section 1581(i) jurisdiction merely because section 1581(a) rights had been lost. That case is *stare decisis* here and as the above reasoning indicates, is not clearly erroneous.[7]

Thus, plaintiff is left to its ordinary remedies. It did not file a timely request for reliquidation and its protest, therefore, was validly denied. Plaintiff's attempt to avoid the operation of the administrative statutes of limitation must fail.

For all of the foregoing reasons the court grants defendant's motion for summary judgment.

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[5] The court reserved decision on whether tha action was "patently *ultra vires*," *id.*, and ultimately found it was not. *Miller* v. *United States*, 10 CIT ——, 648 F. Supp. 9, *appeal docketed*, No. 87–1083 (Fed. Cir. Nov. 26, 1986).

[6] Contrary to plaintiff's argument, the concessions made by the parties in *Star Sales* do not distinguish it from the case at hand. As was conceded in *Star Sales*, the court finds here that T.D. 79–158 is the equivalent of a CVD order and both courts assume, at least for the sake of plaintiffs' argument, that Customs acted in an illegal manner in not suspending liquidation.

[7] Section 1581(i) jurisdiction also may be unavailable if more than two years have passed following accrual of the cause of action under section 1581(i). *See* 28 U.S.C. § 2636(h) (1982). Actions complaining of illegal acts may be barred by statutes of limitations. *See, e.g., DeBonis* v. *United States*, 103 F. Supp. 123 (W.D.Pa. 1952). Exactly when the claim accrues under section 1581(i) is not entirely clear. Accrual may be affected by how the claim is characterized or how pursuit of administrative remedies is viewed. Unlike section 1581(a) jurisdiction, section 1581(i) jurisdiction is not predicated on exhaustion of mandatory administrative remedies. The general rule is that pursuit of permissive administrative remedies does not toll running of the statute of limitation or delay accrual of the cause of action. *See Lipp* v. *United States*, 301 F.2d 674 (Ct. Cl. 1962) *cert. den.* 373 U.S. 932 (1962). Exhaustion of such remedies may take so long that the purpose of the statute, that of barring stale claims, is defeated. On the other hand, courts have held that the encouragement of non-judicial resolution of disputes warrants tolling in some instances. *See Galino* v. *Stoudy Co.*, 793 F.2d 1502, 1510 (9th Cir. 1986) (fair representation claim tolled during pursuit of grievance procedures.) Another court defined the same situation as non-accrual of the cause of action. *Adkins* v. *International Union of Electrical Radio Workers*, 769 F.2d 330, 335–36 (6th Cir. 1985). As this issue was not argued by the parties and the court otherwise has found no basis for section 1581(i) jurisdiction, this issue will not be resolved here.

(Slip Op. 87-78)

OSWEGO BARGE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-11-01604

Before RE, *Chief Judge.*

MEMORANDUM OPINION

Plaintiff seeks remission of duties paid on the cost of foreign repairs made to its oil barge.

Held: Since the Secretary's determination not to remit the duties was not an abuse of discretion, and was in accordance with law, the action is dismissed.

[Judgment for defendant; action dismissed.]

(Decided July 9, 1987)

Healy & Baillie (George M. Leing and *John C. Koster,* at the trial and on the brief), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Veronica A. Perry,* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* Plaintiff, Oswego Barge Corp., brought this action to recover customs duties paid on certain repairs made in a foreign country to the Nepco 140, an oil tanker barge of American registry. Plaintiff maintains that, pursuant to 19 U.S.C. § 1466, the duties should have been remitted by the Secretary of the Treasury.

Plaintiff contends that, under the facts presented, the Secretary's refusal to remit the duties in question was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In the alternative, plaintiff asserts that, as applied to the facts of this case, the statute which authorizes the assessment of duty on the cost of foreign repairs is unconstitutional as violative of plaintiff's fifth amendment right to due process of law.

The questions presented are whether the Secretary's refusal to remit the duties paid on the repairs made in Canada was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, and whether, as applied to the facts of this case, section 1466 of title 19 U.S.C. is constitutional.

It is the holding of the court that the Secretary's determination not to remit the duties under section 1466 of title 19 U.S.C. was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Since the court also holds that, as applied to the facts of this case, section 1466 is constitutional, the determination of the Secretary is affirmed, and the action is dismissed.

The Nepco 140 is a steel oil tanker barge which is registered in the United States. The barge was employed to carry fuel oil from the Montreal area to a power plant in Oswego, New York. During a journey to Oswego, the barge, carrying over 100,000 barrels of fuel oil, struck ground while in fog, and suffered damage to several of its cargo tanks. A "massive oil spill" followed the grounding. *See In re Oswego Barge Corp.,* 664 F.2d 327, 331 (2d Cir. 1981), *reh'g denied,*

673 F.2d 47 (1982); *see also In re Oswego Barge Corp.*, 439 F. Supp. 312, 314 (N.D.N.Y. 1977). As a result of the oil spill, the governments of the United States and Canada conducted a joint clean-up operation in the Saint Lawrence Seaway. During the joint clean-up effort, most of the oil remaining in the damaged tanks was transferred to another vessel.

The Coast Guard authorized the Nepco 140 to continue to Oswego, New York, its intended destination, where the balance of its cargo was discharged. Upon completion of the clean-up, the United States brought an action against plaintiff to recover both its own expenses and those it was forced to reimburse the Canadian government, a total of approximately 9 million dollars. 439 F. Supp. at 321.

Following its arrival at the port in Oswego, the Nepco 140 was inspected and a damage report was prepared. Based on this report, the Port Engineer determined that, for the Nepco 140 to be repaired, it needed to be "drydocked," that is, lifted completely out of the water. The Engineer also determined that, since the Nepco 140 might sink in an attempt to make an extended voyage, a nearby repair facility was necessary. Plaintiff contends that the Nepco 140 was repaired at a Canadian shipyard because no American shipyard could be found that could make the necessary repairs within a safe distance. The repairs performed in Canada included "owner's work," that is, ordinary maintenance repairs not caused by the groundings, and which did not require drydocking.

After the barge was repaired and returned to the United States, pursuant to section 1466 of title 19 U.S.C., plaintiff was required to pay $125,000 for duties on the repairs made to the Nepco 140 in Canada. Plaintiff subsequently instituted this action seeking a remission or refund of the duties paid. Alternatively, it sought a determination that the remission statute, as applied, was unconstitutional.

Section 1466 of title 19 U.S.C., authorizes the Secretary of the Treasury to remit or refund duties assessed on the cost of foreign repairs if, in the Secretary's discretion, the statutory criteria for remission have been met. 19 U.S.C. § 1466. This court has held that the Secretary's discretionary decision not to remit duties is reviewable under the pertinent provisions of the Administrative Procedure Act. *See Suwannee S.S. Co.* v. *United States*, 70 Cust. Ct. 327, 333, CRD 73-3, 354 F. Supp. 1361, 1366 (1973).

Section 10 of that Act provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * * * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *.

Administrative Procedure Act § 10, 5 U.S.C. § 706(2)(A) (1982).

In cases of express delegation of discretionary authority, it is clear that the standard of judicial review is limited. *See Suwannee S.S. Co.* v. *United States,* 79 Cust. Ct. 19, 23, C.D. 4708, 435 F. Supp. 389, 392 (1977). In addition, it is well established that "[i]f the administrative decision has a rational basis in fact and is not contrary to law, the courts will not substitute their discretion for that of the administrator." *Mount Washington Tanker Co.* v. *United States,* 1 CIT 32, 35, 505 F. Supp. 209, 212 (1980), *aff'd,* 69 CCPA 23, 665 F.2d 340 (1981).

Plaintiff contends that the duties assessed on the cost of repairs made to the Nepco 140 should be remitted under the language of section 1466. Section 1466(a) provides:

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country * * *.

19 U.S.C. § 1466(a) (1982).

Section 1466(d), which governs remission of duties paid for repairs made in a foreign country, provides, in part:

If the owner or master of such vessel furnishes good and sufficient evidence that—

(1) such vessel, while in the regular course of her voyage, was compelled, *by stress of weather or other casualty,* to put into such foreign port and purchase such equipments, or make repairs, to secure the safety and seaworthiness of the vessel *to enable her to reach her port of destination;*

then the Secretary of the Treasury is authorized to remit or refund such duties * * *.

19 U.S.C. § 1466(d)(1) (emphasis added).

Section 1466(d) places upon the plaintiff the burden of establishing the statutory criteria by "good and sufficient evidence." 19 U.S.C. § 1466(d); *see, e.g., Mount Washington Tanker Co.* v. *United States,* 1 CIT 32, 505 F. Supp. 209 (1980), *aff'd,* 69 CCPA 23, 665 F.2d 340 (1981); *see also Suwannee S.S. Co.* v. *United States,* 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977). Furthermore, it cannot be questioned that Congress expressly delegated to the Secretary the

discretion to determine whether, under the circumstances, the duties were to be remitted or refunded. 19 U.S.C. § 1466(d).

In the *Suwannee* case, the plaintiff challenged the Secretary's decision not to remit duties paid pursuant to section 466 of the Tariff Act of 1930, which is presently codified at 19 U.S.C. § 1466. The plaintiff contended that the duties should have been remitted because the foreign repairs were the result of a casualty. The Secretary refused to remit because the "casualty" which caused the need for repairs had occurred on a prior voyage. The court held the Secretary's decision not to remit the duties was not an abuse of discretion, and was in accordance with law.

In *Suwannee,* the court reviewed the legislative history of section 1466, and determined that its purpose was to protect American labor. 79 Cust. Ct. at 26, 435 F. Supp. at 394. The court noted that the unsuccessful attempts in the House of Representatives to amend section 1466 so as to enlarge the remission provision's coverage were indicative of the strong measures sought by Congress to protect the domestic shipbuilding industry. *Id.* The court also noted that the Senate version of section 1466 narrowed the remission provision's coverage in two ways. First, it required that the repairs be necessitated "by stress of weather or other casualty." Second, it limited remission to those repairs which are "necessary to secure the safety and seaworthiness of the vessel *to enable her to reach her port of destination.*" *Id.* (emphasis added). Consequently, the *Suwannee* case noted that Congress intended to formulate "a narrow and strict remission provision." *Id.; see also Mount Washington Tanker Co.* v. *United States,* 1 CIT 32, 38–39, 505 F. Supp. 209, 214 (1980), *aff'd,* 69 CCPA 23, 665 F.2d 340 (1981). Simply stated, the statute is meant "to encourage U.S. shipowners to employ U.S. labor whenever possible." *Mount Washington,* 69 CCPA at 28, 665 F.2d at 344.

In this case, the Secretary denied plaintiff's demand for the remission of the duties assessed on the cost of the Canadian repairs made to the Nepco 140. Plaintiff maintains that the Secretary improperly refused to remit the duties paid. A careful examination of the facts and relevant statutes reveals that the Secretary's decision was not an abuse of discretion, and was in accordance with law.

Even assuming that reduced visibility caused by the fog satisfied the causational requirement of the statute, that is, "stress of weather or other casualty," plaintiff has failed to demonstrate that the repairs were necessary to "enable" the Nepco 140 to "reach her port of destination." Indeed, there is no dispute that the Nepco 140 proceeded to Oswego, the port of destination in the United States, and discharged the balance of the cargo.

The facts show that the repairs made to the Nepco 140 were not necessary to enable her to reach her port of destination. Hence, plaintiff has not borne its burden of establishing the statutory criteria. Therefore, the court holds that the Secretary's decision is in accordance with law, and is not the result of an abuse of discretion.

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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Even assuming that reduced visibility caused by the fog satisfied the causational requirement of the statute, that is, "stress of weather or other casualty," plaintiff has failed to demonstrate that the repairs were necessary to "enable" the Nepco 140 to "reach her port of destination." Indeed, there is no dispute that the Nepco 140 proceeded to Oswego, the port of destination in the United States, and discharged the balance of the cargo.

The facts show that the repairs made to the Nepco 140 were not necessary to enable her to reach her port of destination. Hence, plaintiff has not borne its burden of establishing the statutory criteria. Therefore, the court holds that the Secretary's decision is in accordance with law, and is not the result of an abuse of discretion.

Alternatively, plaintiff contends that section 1466 is unconstitutional as applied to the facts of this case. Plaintiff maintains that since it was impossible for an American Shipyard to make the repairs, the imposition of the duties was unconstitutional. This court has indicated that "[p]laintiff can only succeed on its constitutional challenge by rebutting the strong presumption that legislation duly enacted by Congress is constitutional." *Erie Navigation Co.* v. *United States,* 83 Cust. Ct. 47, 49, C.D. 4820, 475 F. Supp. 160, 162 (1979).

In support of its constitutional argument, plaintiff maintains that this case raises issues mentioned in dicta in the *Erie Navigation* case, which stated that, "[h]ad the plaintiff proven that it was impossible for its vessel * * * to reach an American drydock facility for the required inspection, the question would then be presented as to the reasonableness of the statute as applied to the particular case." *Id.* at 52, 475 F. Supp. at 164. In the *Erie Navigation* case, the court noted:

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Id. at 49, 475 F. Supp. at 162 (citing *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976)).

Plaintiff, therefore, must bear the burden of establishing the facts necessary for a determination of unconstitutionality. From the evidence adduced at trial, the court is not persuaded that it was "impossible" for the barge to be repaired at an American facility. Indeed, at trial, the defendant called Mr. Kenneth Johnson, an employee of Fraser Shipyards, who testified that Fraser was capable of performing the needed repairs, although certain repairs might be "subcontracted out." Plaintiff's witness, Mr. Daniel Kaplan, whose duty was to "secure competitive bids, to find a yard capable of carrying out the repairs," declined to have the work done at Fraser Shipyards.

The testimony reveals that Mr. Kaplan exercised his business judgment by not having the work performed in the United States. For example, although Hannah Inland Waterways telexed Mr. Kaplan that Hannah could clean and gas-free the barge, Mr. Kaplan declined their services. Hence, it has not been established that it was impossible to find a domestic yard to perform the work. The alleged "impossibility" to which plaintiff makes reference was a business decision to have the repairs made in Canada.

Since plaintiff has failed to show that no American facility would have been able to make the necessary repairs to the Nepco 140, the court is not presented with the question raised in dicta in the *Erie Navigation* case. In view of plaintiff's failure to establish that section 1466 is unconstitutional as applied to the facts of this case, the

challenge to its constitutionality must fail. *See Erie Navigation Co.* v. *United States,* 83 Cust. Ct. at 52, 475 F. Supp. at 165.

Plaintiff has not established that it meets the statutory criteria which would authorize the secretary to remit the duties paid. Furthermore, since plaintiff has neither proven its factual allegations, nor established that, as applied, section 1466 is unconstitutional, its constitutional challenge must also fail. Accordingly, the Secretary's determination not to remit the duties paid is upheld.

Plaintiff's action is dismissed.

(Slip Op. 87–79)

BONANZA TRUCKING CORP., PLAINTIFF *v.* THE UNITED STATES OF AMERICA ET AL., DEFENDANTS

Court No. 86–03–00350

MEMORANDUM AND ORDER

[Award of attorneys' fees to plaintiff.]

(Dated July 10, 1987)

Soller, Singer & Horn (Carl R. Soller and *Margaret Hardy Sachter,* of counsel) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Paula N. Rubin*) for the defendants.

AQUILINO, *Judge:* The court in its decision of June 18, 1987, 11 CIT ——, Slip Op. 87–70, granted in part plaintiff's application for an award of attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and accepted therein counsel's offer to produce their time records for review. Those records have been produced, and the court's review of them leads to the following determinations:

I

The June 18 decision concluded that the plaintiff was entitled to recover fees for Carl R. Soller and William C. Shayne at a rate of $75 for each hour of work on this matter adquately reflected in their time records.

Plaintiff's application seeks an award for a total of 62 hours on the part of Mr. Soller. The records produced support such an award.

The application seeks an award for 145.25 hours for Mr. Shayne. His records support an award for 137.5 hours.[1]

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[1] It is unclear from the records submitted that the other hours were spent on this case. *See, e.g.,* Exhibit K (May 23–31, 1985).

The plaintiff also seeks recovery for the work of Richard M. Wortman, who had been a summer associate/law clerk. The court granted recovery in Slip Op. 87–70, conditioned upon presentation of Mr. Wortman's time records and rate of compensation. An affidavit has been submitted attesting that his average salary was $11.11 per hour during the course of this matter, and the time records provided reflect a total of 52.75 hours spent on the case in chief.[2]

II

The court also held in Slip Op. 87–70 that the plaintiff was entitled to recovery of fees for the time spent preparing its application, relying on *Schuenemeyer* v. *United States,* 776 F.2d 329, 333 (Fed. Cir. 1985). Recently, the Court of Appeals for the Second Circuit has reaffirmed the right under EAJA of successful litigants to such fees, stating, among other things, that "awarding fees for fees avoids the 'Kafkaesque judicial nightmare' of an infinite regression of suits to recover fees for fees and an assessment in each of whether the immediately previous government opposition was 'substantially justified' ". *Trichilo* v. *Secretary of Health and Human Services,* —— F.2d —— (2d Cir. June 26, 1987), relying on *Cinciarelli* v. *Reagan,* 729 F.2d 801, 810 (D.C. Cir. 1984).

This point is apposite herein. In Slip Op. 87–70, the court denied that part of plaintiff's application seeking fees for the services of Margaret Hardy Sachter in support of its case on the ground that, even after grant of leave to file a reply, its application remained inadequate. Nevertheless, time records have been presented for Ms. Sachter which reflect a total of 90.5 hours spent on the fee application itself, as opposed to the time on the case already disallowed for lack of sufficient initial explanation. The interests of avoidance of a regression of the kind referred to in *Trichilo* and of justice support an award to the plaintiff for this fee-application time.[3]

The time records presented also confirm 1.25 hours spent by Mr. Soller on the application, as well as one half hour of work thereon by Mr. Shayne. Attorney time (at $75 per hour) thus aggregates 92.25 hours. In addition, the plaintiff is entitled to an award of $19.44 for the 1.75 hours spent on its application by Mr. Wortman.

CONCLUSION

To summarize the foregoing two points, the plaintiff is entitled to a total award against the defendants of $22,486.74, and judgment will enter accordingly.

The Clerk is directed to return to plaintiff's counsel their original records, which were submitted for the court's review.

SO ORDERED.

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[2] Mr. Wortman's time records [*see* Exhibit DD, Jan. 9, 10, 14, 15, 17, 30 and Feb. 4 and 5, 1986] reflect some 17.75 additional hours, but they appear to have been spent on another matter.

[3] Plaintiff's application sought $175 per hour for Ms. Sachter. As was true for Mr. Soller and Mr. Shayne, the application indicated that such a rate would be appropriate under other circumstances for this lawyer, but it failed to show the existence of a special factor which would justify an award herein in excess of the statutory ceiling of $75 per hour. Hence, the plaintiff is entitled to an award for Ms. Sachter at this rate.

(Slip Op. 87–80)

SAWHILL TUBULAR DIV. CYCLOPS CORP., ATCOR, INC., AND WHEATLAND TUBE CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TATA IRON & STEEL CO., LTD., DEFENDANT-INTERVENOR

Court No. 86–05–00574

Before CARMAN, *Judge.*

[Plaintiff's motion for judgment on the agency record denied.]

(Decided July 13, 1987)

Schagrin Associates, (Paul W. Jameson on the motion), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* on the motion), for the defendant.

Kaplan Russin & Vecchi (*Dennis James, Jr.* and *Kathleen F. Patterson* on the motion) for the defendant-intervenor.

MEMORANDUM OPINION

CARMAN, *Judge:* By motion for judgment upon the agency record under Rule 56.1 of the Rules of this Court plaintiffs challenge the final affirmative determination of the International Trade Administration (ITA or Commerce) in *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at less Than Fair Value,* 51 Fed. Ref. 9089 (March 17, 1986). Plaintiffs contest that part of the final determination which found that welded carbon steel pipe and tube (pipe and tube or standard pipe and tube) produced by Tata Iron and Steel Tubes Ltd. (TISCO) were being sold in the United States below fair market value, and that the estimated weighted average dumping margin was 7.08%.

Plaintiffs contend the ITA's decision to deduct from foreign market value (FMV) an export rebate in the amount of the difference between the cost of steel in India and the international price of steel as a circumstance of sale under 19 U.S.C. § 1677b(a)(4)(B) was not in accordance with law. By contrast, the defendant contends the ITA's adjustment was correct since the export payment effectively reduced TISCO's export related costs and was directly related to TISCO's pipe and tube sales in the United States.

This Court holds the ITA's determination to make a circumstances of sale adjustment to FMV under § 1677(a)(4)(b) in the amount of the export rebate paid to TISCO was reasonable since it was consistent with a reasonable interpretation of the circumstances of sale provision.

FACTS

On July 16, 1985, the Standard Pipe and Tube Subcommittee of the Committee on Pipe and Tube Imports and each of the member companies who produce standard pipe and tube filed a petition with the ITA and the International Trade Commission (ITC). The petitioners alleged that imports of standard pipe and tube were being

sold in the United States at less than fair value causing material injury to the domestic pipe and tube industry.

The ITA determined the petition contained sufficient grounds upon which to initiate an antidumping duty investigation. The ITA thereupon notified the ITC which determined there was a reasonable indication that import of standard pipe and tube were materially injuring, or threatening material injury, to a U.S. industry. *See Certain Welded Carbon Steel Pipes and Tubes From India, Taiwan, Turkey, and Yugoslavia; Determinations,* 50 Fed. Reg. 37068 (Sept. 11, 1985).

During the course of the investigation, TISCO made various claims for an adjustment for the export payments received under the International Price Reimbursement Scheme (IPRS).[1]

In its affirmative preliminary determination, the ITA denied any adjustment to FMV for the IPRS. TISCO was found to have dumping margin of 50.37%. *Certain Welded Carbon Steel Standard Pipe and Tube From India; Preliminary Determination of Sales at less than Fair Value,* 50 Fed. Reg. 53356 (Dec. 31, 1985).

During verification, the ITA determined that the IPRS payment was paid only to Indian manufacturers of pipe and tube that used domestically produced steel in the manufacture of their exported products. If the companies used imported steel or failed to export the pipe and tube, no payments were received. The IPRS payment is equal to the difference between the domestic price and the government-determined international price of steel. *See* Record at 882–83.

The ITA also verified that domestic steel prices are established by the Joint Planning Committee (JPC). Funding for the IPRS payment is provided by the Engineering Goods Export Assistance Fund (EGEAF). The JPC price of steel includes a levy for the EGEAF. *Id.*

In the final determination, the ITA reduced FMV by the amount of the IPRS payment as a circumstances of sale adjustment under § 1677b(a)(4)(B). TISCO was found to have a dumping margin of 7.0–8%. Petitioners commented upon the adjustment, and the ITA responded as follows:

> *Comment 1:* Petitioners argue that the Department should not make a circumstances of sale adjustment ot TISCO's home market sales price for the International Price Reimbursement Scheme (IPRS) because (1) the program might be countervailable; or (2) the program is not comparable to any situation in which circumstance of sale adjustments ordinarily are allowed; or (3) the program is merely an institutionalized cover for dumping because TISCO both pays into and receives rebates from the program.
>
> *DOC Response:* We Disagree. First, the countervailability of the IPRS should be addressed in the context of a counter-

[1] In its questionnaire response, TISCO claimed that the IPRS was an "uncollected or rebated tax and duty." Record at 227. TISCO then contended that the IPRS is comparable to an import duty drawback. Record at 507. Later TISCO argued that FMW should be reduced by the IPRS since it is a difference in material cost. Record at 600–01. Prior to the date of the preliminary determination, TISCO claimed that the IPRS export payment was a circumstance of sale which should be used to reduce FMV in accordance with § 1677b(a)(4)(B).

> vailing duty investigation. Here, we are determining whether the IPRS meets the requirements for a difference in circumstances of sale adjustment, as provided for in the law and § 353.15 of the Commerce Regulations. Secondly, in this case, the IPRS rebate is directly related to, and in fact contingent upon, the export sale of the merchandise under investigation. Receipt of the IPRS effectively enhanced the net return to TISCO on those sales. Therefore, we believe this adjustment is comparable to other circumstances of sale adjustments.
>
> Third, although TISCO pays required levies into and receives payments from the Engineering Goods Exports Assistance Fund (EGEAF), it does so according to the rates established by the Indian government. Monies for this generalized fund come from assessments included in the government-set price of steel. The formula for rebates is tied to the difference between domestically-produced and internationally-acquired steel prices. As such, the fact that this rebate acts as a revenue enhancement for TISCO does not constitute dumping.

51 Fed. Reg. at 9091.

BACKGROUND

The antidumping law provides for the imposition of antidumping duties when imported merchandise is sold or is likely to be sold in the United States at less than fair value. In general, it must also be determined that an industry in the United States is being or is likely to be injured or prevented from being established as a result of these sales. 19 U.S.C. § 1673.

In general terms, merchandise is sold at less than fair value when the purchase price or the exporter's sales price is less than its FMV. FMV is defined to include the price of the merchandise, at the time of exportation to the United States, at which such or similar merchandise is sold or offered for sale in the home market in the usual wholesale quantities and in the ordinary course of trade. 19 U.S.C. § 1677b(a).[2]

When it is established to the satisfaction of the administering authority that the amount of the difference between the USP and the FMV is wholly or partially attributable to other differences in the circumstances of sale, and adjustment to FMV is appropriate. The statutory authority for adjustment provides as follows:

> (4) *Other adjustments.*—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
>
> *   *   *   *   *   *   *

[2] Although fair value is usually determined by the exporter's comparable home price, in appropriate circumstances, the exporter's price in a third country market or the constructed value of the merchandise may be used. *See.* § 1677b(a).

(B) other differences in circumstances of sale; or

* * * * * * *

then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(B).[3] The Commerce regulation governing the circumstances of sale adjustment provides in pertinent part as follows:

§ 353.15 Differences in circumstances of sale.

(a) *In general.* In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a pruchase's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

* * * * * * *

(d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, were appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

19 C.F.R. § 353.15.

Discussion

The question presented for decision is whether or not the ITA acted in accordance with law when it reduced FMV, as a circumstance of sale pursuant to § 1677b(a)(4)(B), in the amount of the IPRS export payment received by Indian exporters of standard pipe and tube. Plaintiffs' basic position is that the IPRS rebate is not within the class of situations that the statute, regulations, and legislative history indicate constitute circumstances of sale.

In reviewing this determination, the Court is guided primarily by § 1516a(b)(1)(B) which provides that the Court shall hold unlawful any determination found to be "unsupported by substantial evi-

[3] Additional support for this adjustment is provided by Article VI of the General Agreement on Tariffs and Trade (GATT) which specifies that "[d]ue allowance shall be made in each case for differences in conditions and terms of sales, for differences in taxation, and for *other differences affecting price comparability.*" General Agreement on Tariffs and Trade, *opened for acceptance* Oct 30, 1947, art. VI(1)(b), 61 Stat. A3, A23, 4 Bevans 639, 55 U.N.T.S. 194. (emphasis added).

dence on the record, or otherwise not in accordance with law." Plaintiff contends that the ITA's interpretation of § 1677b(a)(4)(B) as implemented by 19 C.F.R. § 353.15 does not support the ITA's determination to adjust FMV by the amount of the export payment.

At the outset, it should be noted that an agency's interpretation of a statute it is charged with administering is entitled to some measure of deference. Furthermore, in determining the validity of a regulation adopted by the agency, the relevant inquiry is whether or not the regulation is a proper exercise of authority and is reasonable. *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1575 (Fed Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

The circumstances of sale adjustment first appeared in a 1955 Treasury regulation which authorized the agency to make reasonable allowance for circumstances of sale. *See* T.D. 53773 (April 8, 1955), 19 C.F.R. § 14.7(b)(1). Statutory authority for the adjustment followed in the 1958 amendments to the Antidumping Act. The House and Senate Reports provided as examples of the adjustment differences in terms of sale, credit terms, and advertising and selling costs. H.R. Rep. No. 1261, 85th Cong., 1st Sess. 7 (1957); S. Rep. No. 1619, 85th Cong., 2d Sess. 7 (1958).

In 1960, in order to curb the potential for abuse, the regulations were amended to limit the situations in which circumstances of sale adjustments could be granted. Treasury instituted a directly related test in the circumstances of sale provision. The revised regulation provided as follows:

> (2) *Circumstances of sale.*—In comparing the purchase price or exporter's sales price, as the case may be, with the sales, or other criteria applicable, on which determination of fair value is to be based, reasonable allowances will be made for bona fide differences in circumstances of sale if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences.
>
> *Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a reasonably direct relationship to the sales which are under consideration.* Examples of differences in circumstances of sale of which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller or a purchaser's advertising or other selling costs. Reasonable allowances will also generally be made for differences in commissions. Except in those instances where it is clearly established that the differences in circumstances of sale bear a reasonably direct relationship to the sales which are under consideration, allowances generally will not be made for differences in research and development costs, production costs, and advertising and other selling costs of a seller unless such costs are attributable to a later sale of merchandise by a purchaser; provided that reasonable allowances for selling expenses generally will be made in cases where a reasonable al-

> lowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual selling expense incurred in the one market or the total amount of the commission allowed in such other market, whichever is less.
>
> In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise but, where appropriate, may also consider the cost of such differences to the seller, as contributing to an estimate of market value.

T.D. 55118 (April 29, 1960) (emphasis added), 19 C.F.R. § 14.7(b)(2).

Suffice it to say that in the current regulation, the term "reasonably" has been deleted from the direct relationship test. The amended regulation also omits reference to production and research and development costs. *See* 19 C.F.R. § 353.15.

From this, plaintiff contends that the examples of circumstances of sale provided in the regulations and legislative history in accordance with the statutory construction maxim *ejusdem generis*[4] indicate that the difference must be a difference in selling expenses. According to the plaintiff, the idea is that some sort of service has been provided. Since the IPRS payment is neither a selling expense nor a service, plaintiff contends an adjustment to FMV was inappropriate. Plaintiff further contends that the purpose of the antidumping law is to remedy situations in which a foreign producer uses an unfair price to gain entry into and increase sales in the United States, thereby injuring a domestic industry.

In *Rucker* v. *Wabash Railroad Company,* 418 F.2d 146 (7th Cir. 1969), plaintiffs commenced a diversity action against the defendant railroad company for personal injuries sustained by them at a railroad crossing. Plaintiffs alleged, *inter alia,* that the defendant had maintained freight cars on its tracks that constituted "unneccessary obstructions" obscuring the view of oncoming trains to highway travelers in violation of a state statute and its implementing regulations. At the close of the evidence, the trial court directed verdict for the defendant apparently on the ground that the phrase "other unnecessary objects" in the regulations, in accordance with *ejusdem generis,* referred to permanent vegetation obstructions, such as brush, shrubbery, trees, etc., but not to movable freight cars.

On appeal, the defendant railroad company argued that the phrase "other unnecessary objects" in the regulations was limited to natural objects. While holding that *ejusdem generis* is applicable in the context of administrative regulations, the *Rucker* court recognized the limitations of the doctrine when it stated:

[4] The *ejusdem generis* rule provides that where general words follow an enumeration of words of a specific meaning, the general words should apply only to things of the same kind or class of those things specifically mentioned. Black's Law Dictionary 464 (5th ed. 1979)

> When properly applied, the rule of *ejusdem generis* is a useful canon of construction. But it is to be resorted to not to obscure and defeat the intent and purpose of [the enacting body], but to elucidate its words and effectuate its intent. It cannot be employed to render general words meaningless.

Rucker, 418 F.2d at 150 (quoting *Mason* v. *United States,* 260 U.S. 545 (1923)). *See also* 2A N. Singer, Sutherland Stat. Const., § 47.22, (4th ed. 1979) ("the general words are not restricted in meaning to objects of the same kind * * * if there is a clear manifestation of contrary intent").

The *Rucker* court then held that the intent of the agency and the legislature was to place an affirmative duty upon railroads to preserve visibility for highway travelers approaching crossings. As such, the *Rucker* court rejected the narrow construction urged by the defendant in accordance with *ejusdem generis.* The court reached this conclusion despite relevant language in the statute suggesting that "other unnecessary obstructions" pertained to natural objects.

In the same vein, this Court declines to adopt on the basis of *ejusdem generis* a narrow construction of the circumstances of sale provision. Section 1677b(a)(4)(B) was designed to facilitate a fair and efficient comparison between foreign market value and price in the United States market. *F.W. Myers & Co., Inc.* v. *United States,* 72 Cust. Ct. 219, C.D. 4544, 376 F.Supp. 860 (1974). It is also clear that Congress had deferred to the expertise of the agency and vested broad discretion in it to make adjustments for the differences in the circumstances of sale. *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1575 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). One recognized limitation upon this power is that adjustment be made for those factors and conditions which have a direct bearing on or relationship to the sales under consideration. As this Court has aptly stated:

> although the cost factors might vary considerably in each case, depending upon the kind of merchandise involved, the sales and marketing practices, and other conditions, all would have one common element—a reasonably direct effect upon the sales under scrutiny.

F.W. Myers, 72 Cust. Ct. at 233, 376 F.Supp. at 872. *See also Silver Reed America, Inc.* v. *United States,* 7 CIT 23, 581 F. Supp. 1290 (1984), *rev'd on other grounds,* 753 F.2d 1033 (Fed. Cir. 1985) (circumstances of sale adjustment not allowed because costs incurred by manufacturer in delivering unsold typewriters from its factory to its central storage warehouse were not directly related to the sales under consideration). Review of the ITA's findings in this case clearly shows the ITA recognized this limitation when it determined that the IPRS rebate is "directly related to, and in fact con-

tingent upon, the export sale of the merchandise under investigation." 51 Fed. Reg. at 9091.[5]

The agency is empowered to make an adjustment to FMV for the differences in costs that affect prices. In *Smith-Corona,* the Court of Appeals stated that the antidumping law is designed to remedy the situation in which "foreign merchandise is sold or is likely to be sold in the United States at less than *fair value* to the material injury of a United States industry." 713 F.2d 1568, 1571. While the Court stated that antidumping duties are imposed on the basis of differences in value, not differences in cost, the *Smith-Corona* Court upheld 19 C.F.R. § 353.15(d) which establishes a preference for cost in determining the amount of adjustment for differences in the circumstances of sale. The Court further added that "absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related." 713 F.2d at 1577, n.26. *See also Atlantic Steel Co.* v. *United States,* 10 CIT ——, Slip Op. 86–54 (May 20, 1986) (citing 19 CFR § 353.15(d) and holding that the ITA is not required to show that a difference in cost affect price in the home market for an adjustment under the circumstances of sale provision).

Plaintiff nevertheless contends that the ITA may not make an adjustment for every difference in cost. Plaintiff argues, for example, that there are instances in which a foreign producer can prove that its home market product costs more to produce than the comparable United States product. Citing 19 C.F.R. § 353.16, plaintiff contends in such a situation, the ITA does not grant an adjustment. This example, however, proves little since the regulation cited explicitly provides that differences in costs of producing merchandise with identical physical characteristics as end products will not be considered appropriate adjustments. There is no comparable limitation in 19 C.F.R. § 353.15.

Plaintiff contends that the export rebate is simply a straight export subsidy. As such, the plaintiff reasons, it would be unprecedented and very bad policy, in contravention of the purposes of the antidumping law, to reward exporters in a dumping investigation for having received a countervailable subsidy. Plaintiff refers the Court to *Antidumping: Circular Welded Carbon Steel Pipes and Tubes From Thailand; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 3384 (January 27, 1986), in which the ITA did not make an adjustment for that part of a rebate which exceeded the amount of indirect taxes actually incurred by the exported merchandise.

The *Thai* determination, however, is clearly distinguishable. In the antidumping duty investigation, the ITA already had the bene-

[5] Plaintiff also contends the ITA has devised a new criterion for determining whether or not a particular event constitutes a circumstances of sale adjustment—does it "effectively enhance the net return" on the sales in question? The Court finds, however, that the use by the ITA of this language is not materially significant since the ITA clearly followed the test being employed by it that differences in circumstances of sale for which allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales under consideration.

fit of a finding that the amount of the rebate that exceeded indirect taxes and duties incurred was a countervailable subsidy. *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand,* 50 Fed. Reg. 32751 (August 14, 1985). Therefore, the ITA was not called upon to determine in the antidumping investigation whether or not the rebate was a countervailable subsidy. Indeed, such a determination would not have been permissible in light of this Court's decision in *Huffy Corp.* v. *United States,* 10 C.I.T. ——, Slip Op. 86–36 (March 27, 1986).

In the *Huffy* decision, this Court rejected the notion that the ITA should not have made an adjustment to the USP for an import duty rebate alleged to be a countervailable subsidy. According to the plaintiff in *Huffy,* Congress did not intend that countervailable subsidies be used to reduce dumping margins. Slip Op. at 10. In support of its argument, plaintiff referred the Court to 19 U.S.C. § 1677a(d)(1)(C) which provides an adjustment for tax rebates only if the tax is imposed directly on the merchandise, that is, an "indirect" tax. As the Court of Customs and Patents Appeals had found, relief from indirect taxes did not amount to a countervailable subsidy; whereas, relief from direct taxes, that is, those imposed on the producer rather than on the merchandise is a countervailable subsidy (citing *American Express Co.* v. *United States,* 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973)).

While agreeing that the legislative history of 19 U.S.C. § 1677a(d)(1)(C) indicates that Congress consciously intended that tax remissions constituting countervailable subsidies should not be used to reduce dumping margins, the *Huffy* Court went on to hold that the ITA should refrain from making a subsidy determination in the context of a dumping investigation. The Court provided the following rationale:

> The determination of whether a countervailable subsidy exists is a complex one and Congress has provided a separate set of guidelines for the inquiry. In a dumping investigation the ITA is not seeking the same information or asking the same questions it would in a countervailing duty investigation. For this Court to disallow an adjustment to third country price because the import duty rebate is allegedly a countervailable subsidy would be to bypass the countervailing duty statute and essentially penalize the Taiwanese exporters without allowing them an opportunity at the agency level to have a full hearing on whether the rebates are a subsidy.

Huffy, Slip Op. 86–36 at 11–12. The *Huffy* Court additionally found that the distinction between direct and indirect taxes was more easily made than the distinction between an import duty rebate that is or is not countervailable.

In line with the reasoning of *Huffy,* this Court holds that the distinction between direct and indirect taxes is more easily made than

the distinction between an export payment that is or is not countervailable. Just as the *Huffy* Court held, the ITA properly refrained from making a subsidy determination in the context of its dumping investigation.

Furthermore, there are several cases which indicate how an export payment such as the IPRS should be treated when FMV is based upon constructed value rather than home market prices. In *United States* v. *European Trading Co.,* 27 CCPA 289, C.A.D. 103 (1940), a German producer of wire fish netting received a rebate upon exportation from the supplier of the principal input. The Court of Customs and Patents Appeals held that in calculating the cost of production, the amount of the rebate should not be added. The Court affirmed the lower court which held that even assuming the rebate was a subsidy, the proper cost was the producer's *actual cost,* with no addition for the rebate. *See also A1 Tech Specialty Steel Corp.* v. *United States,* 10 CIT ——, 633 F. Supp. 1376 (1986) (Commerce's decision not to include subsidies in cost of production and constructed value calculations was reasonable).

Plaintiff nevertheless alleges that the granting of an adjustment for an export subsidy, in this case the IPRS, provides a double advantage to exporters. This argument, however, assumes that the IPRS is a countervailable subsidy. In light of the *Huffy* decision, such an assumption by the ITA is inappropriate. It would have been, in the words of the *Huffy* Court, "to bypass the countervailing duty statute and essentially penalize the [Indian] exporters without allowing them an opportunity at the agency level to have a full hearing on whether the rebaters are a subsidy." Slip Op. at 12.

Accordingly, plaintiffs' motion for judgment on the agency record is denied. The final affirmative determination of the ITA is hereby sustained.

(Slip Op. 87-81)

JIMLAR CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-7-01092

Before RE, *Chief Judge.*

MEMORANDUM OPINION

Plaintiff challenges the Customs Service's appraisement or valuation of footwear imported from Taiwan, and contends that the domestic prototypes used by Customs are not "similar" to the imported footwear.

Held: Since plaintiff has failed to rebut the presumption of correctness that attaches to the determination by Customs, this action is dismissed.

[Judgment for defendant; action dismissed.]

(Decided July 14, 1987)

Stedina & Deem (Charles P. Deem, at the trial and on the brief), for the plaintiff.
Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Judith Barzilay,* at the trial, and *Florence M. Peterson,* on the brief) for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper appraisement or valuation, for customs duty purposes of certain men's footwear imported from Taiwan. The Customs Service appraised the merchandise on the basis of American selling price, in accordance with section 402a(g) of the Tariff Act of 1930, 19 U.S.C. § 1402(g) (1976) (repealed 1979).

Plaintiff protests the appraisement of the merchandise on the basis of American selling price, and contends that the imported footwear is not "like or similar" to the domestic prototypes used by customs as a basis for comparison. Specifically, plaintiff contends that the domestic prototypes are not commercially interchangeable, competitive, or an acceptable substitute for the imported merchandise. Plaintiff claims that "appraisement should have been made on the basis of Export Value at $2.619 per pair."

Defendant contends that plaintiff has failed to rebut the statutory presumption of correctness which attaches to the government's appraisement of the imported merchandise. Defendant concedes that the imported footwear is not "like" the domestic prototypes used by Customs, but maintains that the appraisements by Customs were correct because both types of imported footwear are "similar" to the domestic prototypes.

The question presented is whether the domestic prototypes used by Customs as the basis for valuation are "similar" to the imported footwear. If the domestic prototypes are not similar, the valuation was improper, and the appraisement by Customs should have been made on an alternative basis. *See A. Zerkowitz & Co.* v. *United States,* 58 CCPA 60, 70. 435 F.2d 576, 584 (1970), *cert. denied,* 404 U.S. 831 (1971); *Samuel Brilliant Co.* v. *United States,* 9 CIT ——, Slip Op. 84–41, at 2 (Apr. 4 1985); *Stride Rite Corp.* v. *United States,* 9 CIT ——, 605 F. Supp. 279, 282, *aff'd,* 775 F.2d 1158 (Fed. Cir. 1985).

After careful examination of the evidence adduced at trial, the contentions of the parties, and the relevant case law, it is the determination of the court that plaintiff has not overcome the presumption of correctness which attaches to the government's determination of dutiable value. *See* 28 U.S.C. § 2639(a)(1) (1982); *New Trends, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–98, at 3 (1986). Accordingly, the valuation of the imported merchandise by Customs is affirmed.

The Tariff Act defined American selling price as:

> the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for

> delivery, at which such article is freely offered for sale for domestic consumption to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold for domestic consumption in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

Tariff Act of 1930, § 402a(g), 19 U.S.C. § 1402(g) (1976) (repealed 1979).

The merchandise consists of fabric upper, rubber-soled men's casual shoes, style Nos. 43–J–6474 (6474) and 43–J–6475 (6475). The 6475 is an oxford or laced shoe, and the 6474 is a slip-on shoe.

The 6474 footwear was the subject of two court actions, which are presently consolidated under Court No. 80–7–01092. In the first action, the 6474 footwear was appraised and liquidated at $8.50 per pair, less 2 percent or $7.50 per pair, less 2 percent, depending on the date of entry, using the Casablanca style footwear manufactured by P.F. Industries, as the domestic prototype. In the second action, the 6474 footwear was appraised and liquidated at $8.00 per pair, using the Wellco style no. 22804 as the domestic prototype. The 6475 footwear was appraised and liquidated at $9.00 per pair on the basis of American selling price, using Wellco style no. 22806 as the domestic prototype.

A determination as to whether imported merchandise is similar to domestic prototypes is controlled by a four-part test. The factors to be considered include: (1) similarity of material, (2) commercial interchangeability, (3) adaptability to the same use, and (4) the competitive character of the imported and domestic merchandise. *See A. Zerkowitz & Co.* v. *United States*, 58 CCPA 60, 65 435 F.2d 576, 580, (1970), *cert. denied*, 404 U.S. 831 (1971); *Samuel Brilliant Co.* v. *United States*, 11 CIT ——, Slip Op. 87–40, at 3 (Apr. 1, 1987).

At trial, a number of exhibits were entered by the parties, and the court heard the testimony of three witnesses. The witnesses testified as to their opinions whether the domestic prototypes were similar to the imported footwear.

On cross-examination, both of plaintiff's witnesses testified that the materials used in the construction of the imported merchandise and the domestic prototypes are basically similar. As characterized by defendant's witness, all of the shoes are "fabric rubber-soled casual" shoes. Thus, the testimony of all witnesses makes clear that the imported merchandise and the domestic prototypes are made of similar material.

In a case that involves footwear, the second factor, commercial interchangeability, is usually related to the third factor, adaptability to the same use. *See A. Zerkowitz & Co.* v. *United States*, 58 CCPA

60, 66 n.4, 435 F.2d 576, 581 n.4 (1970), *cert. denied,* 404 U.S. 831 (1971); *See also Samuel Brilliant,* Slip Op. 87–40, at 8–9.

The testimony of all witnesses characterized the imported merchandise and their domestic prototypes as casual men's shoes. Thus, it is clear that the Jimlar 6474 and its domestic prototypes, the Casablanca and the Wellco 22804, have similar functions and uses as casual slip-on men's shoes. Additionally, the 6475 and the Wellco 22806 are adaptable to the same use as casual men's oxfords.

Plaintiff's witnesses, however, testified that the imported merchandise and the domestic prototypes are not commercially interchangeable. Specifically, they testified that the domestic prototypes, the Casablanca shoe, with its espadrille construction, and the three-colored Wellco 22804, appealed to "high fashion" customers, whereas the Jimlar 6474, with its California construction, appealed to the comfort-oriented customer. Additionally, they testified that the oxfords, the Wellco 22806, characterized as a boat shoe, and the Jimlar 6475, are not commerically interchangeable because the Wellco 22806 was sold to a youthful, fashion conscious market, and the Jimlar shoe was sold to a more conservative market interested in comfort.

Although the defendant's witness conceded that there were some styling differences between the imported shoes and their domestic prototypes, he nevertheless gave reasons why a customer would be satisfied with either shoe. On cross-examination, when asked why he thought the shoes were substitutes for one another, he replied that "if the consumer came in and you were out of the size in * * * one, he would very readily buy [the other] shoe instead because it's the same price and it's the same use and they have similar styles and comfort features." In addition, on cross-examination, defendant's witness was asked whether the domestic prototyes were aimed at a particular market. In order to indicate that the targeted market was broad, he replied, "[y]ou aim, but you don't have a rifle. It's a shotgun."

The differences in styling, therefore, do not persuade the court that the Customs Service erred in their selection of the domestic prototypes. It has long been the rule that goods may be legally similar for appraisement purposes even though numerous differences exist. *See Albert F. Maurer Co.* v. *United States,* 51 CCPA, 114, 120, C.A.D. 845 (1964).

The final factor in the four-part test, competitive character, highlights the similarity between the imported shoes and their domestic prototypes. As this court has noted, "[t]wo important aspects of competitiveness for comparison are price and place where marketed or sold." *Samuel Brilliant,* 11 CIT ——, Slip Op. 87–40, at 6.

The testimony adduced at trial revealed that the imported shoes and the domestic prototypes sold for approximately the same price. The witnesses also testified that the imported shoes and domestic prototypes would be marketed together and would even be dis-

played in the same area in the retail stores. From all of the testimony, the court concludes that the imported shoes and the domestic prototypes are competitive merchandise, and that the domestic prototypes were properly used by Customs as the basis for the valuation.

Although plaintiff contends that the domestic prototypes are not similar to the imported shoes, it has failed to introduce sufficiently persuasive evidence to prove that the merchandise was improperly appraised by Customs Service.

Therefore, it is the determination of the Court that plaintiff has not rebutted the presumption of correctness that attaches to the appraisal by the Customs Service. Accordingly, the appraised values are affirmed, and the action is dismissed.

(Slip Op. 87–82)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–06–00738

[Plaintiff's application for preliminary injunction denied.]

(Dated July 14, 1987)

Stewart and Stewart (Eugene L. Stewart and *Terence P. Stewart)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*Platte B. Moring, III*) for the defendant.

Graham & James (Lawrence R. Walders and *Brian E. McGill*) for China National Machinery & Equipment Import and Export Corporation, *amicus curiae.*

MEMORANDUM OPINION

TSOUCALAS, *Judge:* This opinion is issued in conformity with this Court's order of June 24, 1987, denying plaintiff's application for a preliminary injunction. Plaintiff commenced this action to challenge a final affirmative determination by the Department of Commerce, which excluded one foreign exporter from the scope of the dumping finding. *Tapered Roller Bearings from the People's Republic of China; Final Determination of Sales at Less Than Fair Value,* 52 Fed. Reg. 19748 (May 27, 1987). Plaintiff concurrently applied for a temporary restraining order and preliminary injunction, seeking to enjoin liquidation of the entries from China National Machinery & Equipment Import & Export Corporation (CMEC), the exporter excluded from the final determination. On June 17, 1987, this Court denied plaintiff's application for a temporary restraining order and on June 23, 1987, oral arguments and a full hearing were had before this Court on whether a preliminary injunction should issue.

CMEC's application to appear *amicus curiae* at the hearing was granted.

BACKGROUND

Plaintiff is a domestic producer of tapered roller bearings (TRBs), and was petitioner below in the antidumping investigation of TRBs from the People's Republic of China (PRC). The investigation covered two exporters: (1) CMEC, the only known exporter of TRBs from the PRC to the United States; and (2) Premier Bearing & Equipment, Limited (Premier), a Hong Kong based trading company, exporting TRBs produced in the PRC, from Hong Kong to the United States. In the PRC, the same factories produce TRBs for both companies. Therefore, when Commerce issued its preliminary determination of sales at less than fair value, a single margin of 9.65 percent was estimated for both companies, to prevent those factories from selling through the exporter with the lower margin. 52 Fed. Reg. 3833 (February 6, 1987). As of the date of that preliminary determination, liquidation of Chinese TRB entries was suspended. On May 27, 1987, Commerce published the results of its final determination that TRBs from the PRC are being sold at less than fair value with a weighted average dumping margin of .97 percent; however, no dumping margins were found for CMEC. 52 Fed. Reg. 19748 (May 27, 1987). Subsequently, the ITC determined that a domestic industry is suffering material injury or threat thereof by reason of imports from the PRC. *Tapered Roller Bearings and Parts Thereof and Certain Housing Incorporating Tapered Rollers from Hungary, The PRC, and Romania,* 52 Fed. Reg. 22399 (June 11, 1987).

As a result of the negative finding that CMEC exports were not subject to dumping duties, Commerce directed suspension of liquidation terminated for these entries. 52 Fed. Reg. 19748. Plaintiff alleges several errors committed by Commerce in its finding of no dumping by CMEC, and argues that if its contentions are ultimately sustained after the goods have been liquidated, then its remedy has been forfeited. This loss of complete relief, in conjunction with the proprietary losses, which it is alleged that plaintiff will incur, are the gravamen of plaintiff's claim of irreparable injury.

DISCUSSION

In order for a preliminary injunction to issue, plaintiff must clearly demonstrate: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) that the public interest is better served by issuing rather than by denying the injunction; and (4) that the balance of hardships to the parties favors the issuance of an injunction. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983); *S.J. Stile Assocs., Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981). In a flexible balancing approach, the showing of ultimate success is inversely pro-

portional to the severity of the injury. *American Air Parcel Forwarding Co., Ltd.* v. *United States,* 1 CIT 293, 298, 515 F. Supp. 47, 52 (1981). "[T]he critical factors are the probability of irreparable injury to the movant should the equitable relief be withheld, and the likelihood of harm to the opposing party if the court were to grant the interlocutory injunction." 1 CIT at 299–300, 515 F. Supp. at 53; *United States Steel Corp.* v. *United States,* 9 CIT ——, ——, 614 F. Supp. 1241, 1243 (1985).

Since successful challenges to dumping determinations result in prospective relief only, the court, where appropriate, may enjoin liquidation pending the outcome of the litigation. *See* 19 U.S.C. § 1516a(c)(2) (1982); S. Rep. 96–249, 96th Cong., 1st Sess. 252–53 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 638. In *Zenith Radio Corp.* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983), it was held that liquidation of entries, the subject of a challenged § 751 annual review determination, may constitute irreparable injury. In the context of an annual review, only one year's entries are subject to the determination. If the movant ultimately succeeds in challenging the results, the only remedy available is to liquidate the entries for that period at the corrected dumping rate. If the entries were liquidated prior to the court upholding the claim, there would be no entries upon which revised margins could be imposed. Absent an injunction, the domestic industry's only remedy would be eliminated. 710 F.2d at 810.

However, where the action contests either negative injury or negative dumping determinations in an investigation, not annual review results, recent cases have declined to hold that liquidation alone is sufficient to establish irreparable harm. *American Spring Wire Corp* v. *United States,* 7 CIT 2, 578 F. Supp. 1405 (1984); *accord Bomont Industries* v. *United States,* 10 CIT ——, 638 F. Supp. 1334 (1986); *U.S. Steel* v. *United States,* 9 CIT ——, 614 F. Supp. 1241 (1985). If the agency's decision is overturned, then unliquidated and future entries may still be subject to corrected antidumping duties. *Bomont,* 10 CIT at ——, 638 F. Supp. at 1338; *American Spring Wire,* 7 CIT at 5, 578 F. Supp. at 1407.

In these situations as opposed to annual reviews, which focus on a discrete time period, the movant still has the opportunity to obtain meaningful judicial review. Even though some entries will be liquidated without additional duties, appropriate relief may be fashioned prospectively. *American Spring Wire,* 7 CIT at 5, 578 F. Supp. at 1407. The opportunity for adequate prospective relief weighs against granting the injuction. *See National Juice Products Ass'n* v. *United States,* 10 CIT ——, ——, 628 F. Supp. 978, 984 (1986) (and cases cited therein).

Congress statutorily recognized that the court must weigh the traditional four factors and issue injunctive relief as an "extraordinary measure" "not [to] be granted in the ordinary course of events." S. Rep. 96–249 at 253, 1979 U.S. Code Cong. & Admin.

News at 639. This is not a situation where plaintiff's "statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination." *Zenith,* 710 F.2d at 810. While plaintiff may not be satisfied that a successful challenge will result in only prospective relief, it retains both its statutory right and a remedy which may be pursued. Some further affirmative showing on plaintiff's part as to irreparable injury is required.

In *Bomont Industries,* the court similarly considered whether an injunction should issue pending the challenge to a final negative determination. In addressing the irreparable harm criteria the court considered whether admission of these goods "without the possibility of offsetting dumping duties will prevent Bomont from recovering profitability, prolong its period of losses, deprive it of working capital, and threaten its very existence." 10 CIT at ——, 638 F. Supp. at 1338. The court found that the requisite showing of irreparable harm was not met where the movant therein: (1) had difficulty competing in the marketplace; (2) experienced a drop in sales and net loss for the first third of that year; (3) achieved an operating profit for the previous year; and (4) for the year preceding that period, sustained a net loss.

Mr. John Hill, plaintiff's Director of Marketing, testified that U.S. import statistics reveal a fivefold increase in TRB consumption in the United States from 1986 to 1987 without a commensurate increase in domestic production but with a dramatic increase in shipments from China. While plaintiff experienced a slight increase in the volume of shipments of TRBs for the first quarter of 1987, this was offset by price depression (approximately 12% from the eight specific models under investigation for the period April 1986–1987). Mr. Hill testified this could have a significant effect on this price sensitive market. Based on field investigations by his sales representatives, Mr. Hill's opinion was that CMEC prices could be as low as 40% below U.S. prices for comparable products and sales; as a result of lost sales and depressed market from those eight parts, plaintiff has incurred several million dollars in lost revenue.

The evidence further indicated that plaintiff's identified losses in the first quarter of 1987 are clearly in excess of U.S. bearing operating profits in 1986. However, SEC reports submitted by plaintiff state that plaintiff's sales were up in the first quarter of 1987 and a similar upswing in the bearing business was further reported. Nevertheless, irreparable injury is not just the mere possibility of injury, *S.J. Stile Assocs.,* 68 CCPA at 30, 646 F.2d at 525; but harm which is imminent regardless of its magnitude. *National Juice Products Ass'n,* 10 CIT at ——, 628 F. Supp. at 984.

Even assuming that these losses are documented and uncontroverted, the question remains whether they are by reason of, and will continue to be a result of, the exports by CMEC. It is in the attempt to causally link these losses from price suppressions, with

CMEC exports, that plaintiff's proof fails. Plaintiff adduced evidence that sales by a competitor, who sells Chinese TRBs, were made at substantially lower prices than plaintiff offers, and plaintiff lost sales as a result of this significant underselling. Nonetheless, for purposes of resolving whether the instant application is warranted the issue is not whether Chinese imports undersold plaintiff (*see Bomont Industries, supra*), rather, it is whether the specific *CMEC* exports threaten immediate irreparable harm. The Court was not convinced on this issue for the following reasons.

The affidavits submitted contained field reports from plaintiff's sales representatives, who obtained competitors' price information from their customers. While these reports identify China as the country of origin of these lower priced TRBs, one report further names the supplier which is apparently a Japanese facility. Secondly, an affidavit submitted from the Vice Managing Director of the Bearing Department at CMEC reveals that although some TRBs were shipped to the United States in the first quarter of 1987, they were pursuant to sales contracts entered into more than one year ago and in one case, in April 1985. *Compare Haarman & Reimer Corp.* v. *United States,* 1 CIT 148, 509 F. Supp. 1276 (1981) (no irreparable injury where imports were presold six months to two years prior to actual delivery, thus, would not be imported within period under review). The last sales contract entered into was in May 1986. Counsel for CMEC represented that only a small amount of that outstanding contract order remains to be shipped.

Plaintiff further argues that a crucial fact herein, not present in *Bomont,* is that the ITC has found material injury to the domestic industry, which was central to the court's decision in *Zenith.* Although a finding of material injury may be probative in determining irreparable harm, in this instance the ITC's determination of material injury resulted from cumulatively assessing the volume and effect of imports from the PRC, Hungary, Romania, Yugoslavia, Japan and Italy. *See* USITC Publication No. 1983 at 12–13 (June 1987). Thus, there was not a finding that by reason of the PRC imports alone, material injury threatened the domestic industry.

Further, PRC exports amounted to one tenth of one percent of the market share of TRB consumption in terms of value and units, and accounted for .2 percent of the market share of imports subject to less than fair value determinations. *Id.* at A–51, A–53. Mr. Hill testified though, that even this fragment of imports could be a significant market share when it serves to depress prices; thus, termination of suspension could affect plaintiff's ability to generate profits. Yet the evidence does not demonstrate that the increase in imports from China in 1987 was (1) from CMEC directly or (2) that the significant increase occurred after February 1987 (when the liquidation was originally suspended).

Moreover, in balancing the hardships, the Court notes that even if suspension continued, there would be no estimated dumping du-

ties imposed, since the margin by which CMEC was found to be dumping was zero. This amount would change only upon a successful challenge on the merits and a subsequent revised determination by Commerce. As mentioned by defendant and *amicus curiae,* suspension would not terminate sale of the goods, but would cause uncertainty to the importers and independent businesses as to the ultimate price of the goods.

Plaintiff's initial substantive allegation is that the ITA constructed foreign market value on the basis of factors of production when it was unable to verify the information relied upon and when verifiable price information was available. Secondly, figures used for factory overhead were contradictory to the evidence of other foreign and domestic producers' actual figures. However, it is noted that Commerce is permitted to consider comparability in economies when choosing constructed value over prices, *Chemical Products Corp.* v. *United States,* 10 CIT ——, 645 F. Supp. 289 (1986), and the same rationale would seem to apply when rejecting factors of production information from noncomparable surrogate countries.

It is further claimed that Commerce denied plaintiff due process by using data in the final calculations which (a) was supplied after the public hearing was held and briefs were submitted; (b) originated from a company who never submitted a surrogate producer questionnaire; and (c) has no support in the record that it was verified. Defendant responds that Commerce was placed in a "best information available" situation and thus, verification is not required. Where a non-market economy, such as the PRC, is under investigation, Commerce must determine foreign market value by reference to surrogate country data. When a comparable surrogate refuses to cooperate, Commerce is faced with competing obligations: on the one hand it must search for a source of reliable accurate data; on the other it must reach its determination within a restricted time frame. Thus, if placed in this best information available situation, the ability to obtain the desired precision in data is seriously constrained. *See generally Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1560 (1984); *Ansoldo Componenti* v. *United States,* 10 CIT ——, 628 F. Supp. 198 (1986). Therefore, it is not entirely clear that the agency's use of this information was unreasonable.

Plaintiff also states that Commerce failed to consider full factory overhead expenses; misapplied the excise tax factor; and used inconsistent sources of data for new steel prices and scrap value comparisons. Although at this juncture the Court sees some merit to plaintiff's claims as relate to the latter two factors, this alone is not sufficient to meet plaintiff's burden. "Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria". *Bomont Industries,* 10 CIT at ——, 638 F. Supp. at 1340.

Conclusion

Plaintiff has failed to establish that it will suffer immediate irreparable harm by reason of the specific imports by CMEC without offsetting dumping duties. Therefore, plaintiff's application for a preliminary injunction must be denied. It has been so ordered.

ABSTRACTED CLASSIFICAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED Item No. and rate	
C87/85	Re, C.J. June 10, 1987	EAC Engineering	84-8-01134	Item 712.05 Various rates	It
C87/86	Re, C.J. June 10, 1987	EAC Engineering	85-5-00668	Item 712.05 Various rates	It
C87/87	Re, C.J. June 10, 1987	Hollywood Accessories	84-6-00754	Item 389.62 21 cents per lb. + 14%	It
C87/88	Watson, J. June 11, 1987	Paul Marshall Products, Inc.	87-1-00129	Item 386.04 28%	It
C87/89	Watson, J. June 11, 1987	Ross Trading Co.	86-1-00045	Item 206.98 5.1%	It
C87/90	Aquilino, J. June 16, 1987	Dynamic Supply Inc.	84-5-00675	Item 740.35 Various rates	It
C87/91	Re, C.J. June 17, 1987	A.N. Deringer, Inc.	83-6-00813	Item 680.17 10.5%	It
C87/92	Newman, S.J. June 18, 1987	Nissho-Iwai American Corp.	81-7-00989	Item 610.80 11% or 10.2%	It It
C87/93	Newman, S.J. June 24, 1987	Sigma Instrument, Inc.	80-2-00335	No allowance under item 807.00	It

TION DECISIONS

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
tem 688.43 4.7%	EAC Engineering v. U.S., S.O. 85–11	Charleston Spark detectors
tem 688.43 4.5%	EAC Engineering v. U.S., S.O. 85–11	Charleston Spark detectors
tem A657.25 Free of duty	Agreed statement of facts	Los Angeles Ratchet tie-downs
tem 386.50 9.3%	Agreed statement of facts	Los Angeles Baskets with linings
tem A207.00 Free of duty	Agreed statement of facts	Los Angeles Oak toilet seats with hardware
tem 688.36 5.1%	U.S. v. Texas Instruments, Inc. 69 CCPA 136 (1982)	New York Electronic watches
tem 680.27 4.5%	Agreed statement of facts	New York 2 skids iron valves
tem 664.05 5% or tem 664.08 4.7%	Nissho-Iwai Corp. v. United States, 8 CIT 264 (1984), aff'd 8/30/85	Los Angeles Steel products
tem 807.00 allowance for cost or value of said metal terminal pins	Sigma Instrument Inc., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Relays, which incorporate metal terminal pins of U.S. origin

ABSTRACTED VALUATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V87/217	Re, C.J. June 11, 1987	Puma USA, Inc.	86-1-00143	Export value	Represe paid t of the per pa pairs at $6. 8,544
V87/218	Watson, J. June 12, 1987	Daiichi Bussan Kaisha Ltd.	278746A, etc.	Export value	F.o.b. ur 20% o f.o.b. appra
V87/219	Watson, J. June 12, 1987	Durlacher & Co.	233346A, etc.	Export value	F.o.b. ur 20% o f.o.b. appra
V87/220	Watson, J. June 12, 1987	H.P. Lambert Co.	R60/21745, etc.	Export value	F.o.b. ur 20% o f.o.b. appra
V87/221	Watson, J. June 12, 1987	H.W. Robinson & Co.	R59/1315, etc.	Export value	Apprais thereo
V87/222	Watson, J. June 12, 1987	Lafayette Electronics Corp.	R59/19244, etc.	Export value	Apprais 7.5%
V87/223	Watson, J. June 12, 1987	Michaelian & Kohlberg, Inc.	R58/11984, etc.	Export value	F.o.b. ur 20% o f.o.b. appra
V87/224	Watson, J. June 12, 1987	National Silver Co.	R63/5768, etc.	Export value	F.o.b. ur differe prices

N DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ented by invoiced price to integrated Shoe Inc. e Phillipines at $6.03 pair net pkd for 456 s of children's sizes and 3.35 per pair net pkd for 4 pairs of men's sizes	Agreed statement of facts	Seattle Articles of footwear
unit invoice prices plus of difference between unit invoice prices and aised values	Agreed statement of facts	New York Woolen piece goods, etc.
unit invoice price plus of difference between unit invoice prices and aised values	Agreed statement of facts	New York Silk scarfs
unit invoice prices plus of difference between unit invoice prices and aised values	Agreed statement of facts	Boston Radios
sed values less 7.5% eof	Agreed statement of facts	New York Silk fabric
sed unit values less thereof, net packed	Agreed statement of facts	New York Radios & parts
unit invoice prices plus of difference between unit invoice prices and aised values	Agreed statement of facts	New York Wool rugs
unit prices plus 20% of rence between f.o.b. unit s and appraised values	Agreed statement of facts	New Bedford Radios & parts

V87/225	Watson, J. June 12, 1987	Sekiya & Co.	R58/22233, etc.	Export value
V87/226	Watson, J. June 12, 1987	Starlight Trading, Inc.	279151A, etc.	Export value
V87/227	Re, C.J. June 17, 1987	F. H. Fenderson Inc.	85-1-00103	Transaction value

Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk fabric
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk articles
Said value, in total, is $300,000 representing actual price paid or payable for said merchandise plus packing costs incurred by the buyer	Agreed statement of facts	Portland, Maine Not stated

Appeals to the U.S. Court of Appeals for the Federal Circuit

United States v. Blum, 11 CIT ——, Slip Op. 87–53, *appeal docketed*, No. 87–1436 (Fed. Cir. July 6, 1987).

C.J. Van Houten & Zoon v. United States, 11 CIT ——, Slip Op. 87–64, *appeal docketed*, No. 87–1448 (Fed. Cir. July 13, 1987).

Decisions of the U.S. Court of Appeals for the Federal Circuit

Matsushita Electric Industrial Co. v. United States, 10 CIT ——, Slip Op. 86–84, *reversed*, No. 86–1678 (Fed. Cir. July 2, 1987).

Hyundai Pipe Co. v. United States, 11 CIT ——, Slip Op. 87–18, *dismissed*, No. 87–1326 (July 7, 1987).

Zenith Radio Corp. v. United States, 10 CIT ——, Slip Op. 86–82, *aff'd*, No. 87–1024 (Fed. Cir. July 2, 1987).

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